# JURISDICTION AND E-COMMERCE DISPUTES IN THE UNITED STATES AND EUROPE



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## I. Introduction.

The Internet impacts in major ways upon questions of jurisdiction. Jurisdiction to prescribe laws and adjudicate disputes historically has been based on territorial principles: if a country found a person within its territory, it exercised jurisdiction over that person. The Internet greatly diminishes the significance of physical location of the parties, because transactions in cyberspace are not geographically based. Moreover, the Internet alters the power balance between distributor and consumer, because it gives consumers instant access to enormous amounts of information and highly sophisticated analytical tools. This affects the basis on which courts have analyzed the ability of parties—and particularly consumers—to make enforceable choices of law and fora.

Courts have wrestled with this new medium in the context of jurisdictional issues since at least as early as 1996. As is discussed in greater detail below, several early decisions in the U.S. based personal jurisdiction in the forum state on the mere accessibility of a website in the forum.[1] Although the better-reasoned cases reject this simplistic notion,[2] mere accessibility of a website as a basis for personal jurisdiction is still alive, usually on the premise—valid or not—that the website operator must have intended that its site have an "effect" within a forum. Indeed, in 2000 a French trial court found jurisdiction over the Internet service provider Yahoo! Inc. ("Yahoo"), located in California, because its U.S. auction website did not prevent access by French residents to portions of the site on which persons offered to sell World War II memorabilia containing Nazi symbols.[3] The court found that it had jurisdiction because the injury—"the offense to the country's collective memory"—had been suffered in France.[4] This consideration overcame the facts that the site was not located in France, was not targeted at France and, indeed, offered only a venue in which persons other than Yahoo offer goods for sale. Indeed, Yahoo has had a subsidiary located in France which complies with the French law forbidding sale of Nazi-related goods on its French website, namely Yahoo.fr.

Recommendations made in London 2000 by the Jurisdiction in Cyberspace Project ("Jurisdiction Project") of the American Bar Association ("ABA"), discussed later, would universalize the principle, recognized in most reported decisions, that accessibility of a website,

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[1] *See* subsection IV.B.1., *infra*.

[2] *See* notes 120-126, *infra*, and accompanying text.

[3] Ordonne du 22 Mai 2000 and Ordonne du 20 Novembre 2000 in *VEJF and LICRA v. Yahoo! Inc.* and Yahoo France (Tribunal de Grand Instance de Paris) ["*Yahoo*"]. For more detailed discussion of *Yahoo*, *see* subsection [V.A.2.a.], *infra*.

[4] Ordonne du 22 Mai 2000.

standing alone, cannot support a claim of jurisdiction.[5] However, courts in both civil and common law countries are increasingly making accessibility of a website the "hook" for jurisdiction. This can partly be explained in the U.S. by resort to the "effects" test" if a website operator can reasonably anticipate a special effect in a given jurisdiction, that can form a jurisdictional basis. In the E.V., where there are no constitutional due process limits on jurisdiction, the mere fact that an offending site can be seen in a jurisdiction may form a basis, at least in civil law countries. Beyond these distinctions, there are clear differences between the E.U. and the U.S. in their approach to predispute choice of jurisdiction and law by consumers.

## II. Background.

### A. Fundamental Jurisdictional Principles Under International Law.

International law limits a country's authority to exercise jurisdiction in cases that involve interests or activities of non-residents.[6] First, there must exist "jurisdiction to prescribe." If jurisdiction to prescribe exists, "jurisdiction to adjudicate" and, "jurisdiction to enforce" will be examined. The foregoing three types of jurisdiction are often interdependent and based on similar considerations.[7]

"Jurisdiction to prescribe" means that the substantive laws of the forum country are applicable to the particular persons and circumstances.[8] When a country has jurisdiction to prescribe, it can appropriately apply its legal norms to conduct. Simply stated, a country has jurisdiction to prescribe law with respect to: (1) conduct that, wholly or in substantial part, takes place within its territory; (2) the status of persons, or interests in things, present within its territory; (3) conduct outside its territory that has or is intended to have substantial effect within its territory; (4) the activities, interests, status, or relations of its nationals outside as well as within its territory; and (5) certain conduct outside its territory by persons who are not its nationals that is directed against the security of the country or against a limited class of other national interests.[9]

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[5]The recommendations would also dispel the myth that all consumers are unable to make informed and binding decisions on choice of law and choice of forum—an issue not involved in the *Yahoo* case, but one that separates U.S. and Europe on choice of law.

[6]RESTATEMENT (3RD) OF THE FOREIGN RELATIONS LAW OF THE U.S. ["RESTATEMENT"] §401, comment a (1987).

[7]*Id.* 230-31.

[8]*Id.* 236-37.

[9]*Id.* §402.

Jurisdiction to adjudicate means that the tribunals of a given country may resolve a dispute in respect to a person or thing where the country has jurisdiction to prescribe the law that is sought to be enforced.[10] The exercise of jurisdiction by a country is subject also to the requirement of reasonability.[11] States exercise jurisdiction to adjudicate on the basis of various links, including the defendant's presence, conduct, or, in some cases, ownership of property within the country, conduct outside the state having a "substantial, direct and foreseeable effect" within the country or the defendant's nationality, domicile, or residence in the country.[12] Exercise of judicial jurisdiction on the basis of such links is on the whole accepted as "reasonable"; reliance on other bases, such as the nationality of the plaintiff or the presence of property unrelated to the claim, is generally considered "exorbitant."[13]

A country may employ judicial or nonjudicial measures to induce or compel compliance or punish non-compliance with its laws or regulations, provided it has jurisdiction to prescribe.[14] Thus, a country may not exercise authority to enforce law that it had no jurisdiction to prescribe. A country may employ enforcement measures against a person located outside its territory if (a) the person is given notice of the claims or charges against him that is reasonable in the circumstances; (b) the person is given an opportunity to be heard, ordinarily in advance of enforcement; and (c) where enforcement is through the courts, if the country has jurisdiction to adjudicate.[15]

Cutting across the foregoing international law criteria in the U.S. is a general requirement of reasonableness. Thus, even when one of the foregoing bases of jurisdiction is present, a country may not exercise jurisdiction to prescribe law with respect to a person or activity having connection with another country if the exercise of jurisdiction is unreasonable.[16]

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[10]RESTATEMENT 304.

[11]*Id. §421(1).*

[12]*Id., 305, see* RESTATEMENT §421(2).

[13]*Id.* It should be observed that while the principle of reasonableness to limit the exercise of jurisdiction to adjudicate also applies with respect to jurisdiction to prescribe, the standards of reasonableness are not the same. The fact that an exercise of jurisdiction to adjudicate in given circumstances is reasonable does not mean that the forum state has jurisdiction to prescribe in respect to the subject matter of the action. Conversely, there may be circumstances in which a state has jurisdiction to prescribe but jurisdiction to adjudicate is absent or doubtful. *Id.*

[14]RESTATEMENT §431(1).

[15]*Id.*

[16]RESTATEMENT §403(1). In addition, Section 403(2) enumerates different factors which have to be evaluated in determining the reasonableness of assertion of jurisdiction: (1) the link of the activity to the territory of the regulating state, *i.e.*, the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory; (2) the connections, such as nationality, residence, or economic activity, between the regulating state and the persons principally responsible for the activity to be regulated, or

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The net effect of the reasonableness standard is to require more close contact between a foreign defendant and the forum country than is required under constitutional due process.[17]

B. Fundamental Jurisdictional Principles in Europe.

Fundamentals of jurisdiction within European countries is based on statute or regulation instead of case law interpreting constitutional due process limitations, as in the U.S. Albeit coming from different perspectives, the results under both systems have a good deal in common. The Brussels Convention has been the controlling document for jurisdictional issues within the European Union ("E.U.").[18] It sets forth the following basic rules. First, a person who is domiciled in an E.U. member country may be sued in that country.[19] Second, in contract matters, a person may be sued in the place of performance of the obligation in question.[20] Third, in tort matters, a person may be sued in the place where the event causing harm occurred.[21] Fourth, a consumer may be sued only in the consumer's country of domicile, while a consumer may elect to bring an action in either his domicile or in the other party's domicile, so long as the consumer was subject to a specific solicitation or advertising in the consumer's domicile.[22] Finally, in contracts not involving a consumer, the parties can agree on a forum for disputes.[23] (Note also that, outside of the Brussels Convention, France will assert jurisdiction whenever the plaintiff in a civil action is a French national.[24])

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between that state and those whom the regulation is designed to protect; (3) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted; (4) the existence of justified expectations that might be protected or hurt by the regulation; (5) the importance of the regulation to the international political, legal, or economic system; (6) the extent to which the regulation is consistent with the traditions of the international system; (7) the extent to which another state may have an interest in regulating the activity; and (8) the likelihood of conflict with regulation by another state.

[17]G. Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 GA. J. INT. & COMP. LAW 1, 33 (1987); *see Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 115 (1987).

[18]*Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters* (Sep. 30, 1968), 1998 OFFICIAL J. C027, 0001-0027 ["Brussels Convention"].

[19]Id., Art. 2.

[20]*Id.*, Art. 5.

[21]*Id.*

[22]Brussels Convention, Arts. 13 and 14.

[23]*Id.*, Art. 17.

[24]Code Civil, Article 14 (Fr.).

Since jurisdiction in European countries is not limited by constitutional principles as it is in the U.S., the Brussels Convention does not require "minimum contacts" between the forum and the defendant.[25] The Convention permits assertion of jurisdiction over a defendant if conduct wholly outside the forum resulted in a tortious injury to the plaintiff within the forum.[26]

C. Fundamental Jurisdictional Principles in the United States.

Traditionally, there are two types of personal jurisdiction which state courts may exert in the U.S.: "general" and "specific." Also relevant to cyberspace law, particularly with regard to ownership of domain name, is "in rem" jurisdiction.

1. General Jurisdiction.

General jurisdiction in the U.S. allows the forum to take jurisdiction over a given person in disputes that do not necessarily relate to the forum. Accordingly, the criteria for application of general jurisdiction under U.S. constitutional due process limitations are very strict. Such jurisdiction can apply only if the defendant's contacts with the forum are "systematic" and "continuous" enough that the defendant might reasonably anticipate defending any type of claim there.[27] General jurisdiction has been accorded less attention thus far than specific jurisdiction (*see* below) in the cases involving the Internet. It may gain importance as E-commerce evolves.

2. Specific Jurisdiction.

Under U.S. law, a given forum has specific jurisdiction over a defendant whose contacts with the forum relate to the particular dispute in issue. In 1945, the U.S. Supreme Court held that personal jurisdiction over a non-resident defendant by a forum state requires only that "he have certain minimum contacts with it, such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[28] Existence of the required "minimum contacts" is determined under a three-part test: (1) the defendant must purposefully direct his activities or consummate some transaction with the forum state or a resident thereof; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum and thereby invokes the benefits and protections of its laws; (2) the claim must be one

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[25] *See* notes 27-30, *infra*, and accompanying text regarding the U.S.

[26] Brussels Convention, Title II, §2, Art. 5.

[27] *International Shoe Co. v. Washington*, 326 U.S. 310, 318 (1945) ("*International Shoe*") (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

[28] *International Shoe*, 326 U.S. 310, 316 (1945).

arising out of or relating to the defendant's forum-related activities; and (3) the exercise of jurisdiction must comport with "fair play and substantial justice," *i.e.*, it must be reasonable.[29]

The seminal example of "purposeful direction" in the context of more traditional media was found where Florida residents wrote and edited an article in the *National Enquirer* which defamed a California resident. The *Enquirer* had its largest circulation in California and was the focal point of both the story and the harm suffered. These factors led the U.S. Supreme Court in *Calder v. Jones* to conclude that there was sufficient evidence that the defendants' actions were "aimed at California" and would be expected to have a "potentially devastating" effect on the California resident, hence the defendants could have reasonably foreseen being brought into court in California.[30] This "effects" test, sometimes labeled "targeting" (although on a strict analysis there are differences between the two), takes on special significance in Internet jurisdiction discussed below at subsection IV.B.2.

While *Calder* involved widely distributed print media, lower court cases both before and after it have used the notion of "purposeful direction" in finding jurisdiction over nonresidents whose only contact with the forum was via radio and television. Thus, a federal district court in 1966 found jurisdiction over the television commentator Walter Cronkite in Oregon on an alleged defamation of an Oregon plaintiff, using a *Calder*-like analysis: although the court found that Cronkite had no physical contacts with Oregon, the facts that he produced the broadcast and knew it would air in Oregon provided a sufficient nexus.[31] Similarly, an Arizona court asserted personal jurisdiction over the television personality Ed Sullivan on the basis that Sullivan produced a television program that he would have known would allegedly invade the privacy of Arizona residents.[32]

After *Calder*, a federal district court in Louisiana found jurisdiction in 1991 over a Mississippi television station and its reporter who had never set foot in Louisiana but who had participated in producing and broadcasting a documentary that allegedly defamed the plaintiffs.[33] In so doing, the court relied directly on *Calder*.[34] Likewise drawing on *Calder*, the federal Seventh Circuit Court of Appeals in 1994 upheld jurisdiction in the State of Indiana over a Canadian Football League team in Baltimore, Maryland that was trying to use the name

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[29]*Core-Vent v. Nobel Industries AB*, 11 F.3d 1482, 1485 (9th Cir. 1993) (citing *Lake v. Lake*, 817 F.2d 1416, 1421 (9th Cir. 1987)).

[30]*Calder v. Jones*, 465 U.S. 783, 789 (1984) ("*Calder*").

[31]*United Medical Laboratories v. Columbia Broadcasting Systems, Inc.*, 256 F. Supp. 570 (D. Ore. 1966).

[32]*Pegler v. Sullivan*, 6 Ariz. 338 (App. 1967).

[33]*Holmes v. TV-3, Inc.*, 141 F.R.D. 692 (W.D. La. 1991).

[34]*Id.* at 696-697.

"Baltimore Colts," which allegedly infringed on the trademark of the Indianapolis Colts (who had until they relocated to Indiana formerly been called the Baltimore Colts). The only activity the defendant had undertaken in Indiana was the broadcast of its games nationwide on cable television.[35] The Seventh Circuit glossed over the concept of "purposeful direction" and instead focused on the place where the injury occurred:

> Since there can be no tort without an injury, . . . the state in which the injury occurs is the state where the tort occurs, and someone who commits a tort in Indiana should, one might suppose, be amenable to suit there.[36]

The court also found that the broadcast on cable TV was an "entry" into Indiana comparable to the sale of defamatory newspapers in *Calder*.[37] The idea that the injury "occurred" in Indiana, hence Indiana should have jurisdiction, can be viewed as not that distant from the French Court's approach in the *Yahoo* case, discussed in more detail below.

A year after *Calder*, but without referring to that precedent, a federal district court in Minnesota found jurisdiction over a California corporation in a trademark infringement case, where the defendant's only contact with Minnesota was the fact that the infringement was generated by a children's television show that reached Minnesota residents.[38] The court found that broadcasting an allegedly trademark infringing program into the forum was itself a sufficient contact, because the offending act—infringement—had occurred there.[39]

The *Calder* test can be difficult to contain unless it is applied strictly. As the Third Circuit has observed, the majority of the circuits that have considered the application of *Calder* to business torts have adopted a narrow construction.[40] For example, the Tenth Circuit applied *Calder* narrowly to a situation where Towne, a Nevada resident who owned real property in Nevada, negotiated with plaintiff Far West Capital ("FWC"), a Utah corporation, which was interested in developing Towne's land.[41] Although the negotiations occurred in Nevada, Towne

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[35] *Indianapolis Colts, Inc. v. Metropolitan Baltimore Football Club Ltd. Partnership*, 34 F.3d 410, 412 (7th Cir. 1994).

[36] *Id.* at 411-412.

[37] *Id.* at 412.

[38] *Tonka Corporation v. TMS Entertainment, Inc.*, 638 F. Supp. 386 (D. Minn. 4th Div. 1985). The court transferred the case to California on venue grounds relating to convenience.

[39] *Id.*, 391.

[40] *See discussion in Imo Industries, Inc. v. Kiekert AG*, 155 F.3d 254, 261 (3d Cir. 1998).

[41] *Far West Capital, Inc. v. Towne*, 46 F.3d 1071 (10th Cir. 1995).

sent a number of letters and faxes to the plaintiff in Utah, and there was an escrow account set up in Utah. Additionally, during the negotiations Towne hired a consultant, a Utah resident, who occasionally picked up materials from FWC in Utah. The parties ultimately entered into a lease, which included a provision that the agreement would be governed by Nevada law. FWC subsequently negotiated with a third party in California regarding financing for the construction of a power plant on the property.

Towne interfered with the negotiation, and FWC brought suit in Utah for, *inter alia*, intentional interference with contractual relations.[42] The Tenth Circuit held that jurisdiction would not lie under *Calder*:

> [T]here is no indication that Utah had anything but a fortuitous role in the parties past dealing or would have any role in their continuing relationship . . . . There is thus no evidence that defendants' alleged torts had any connection to Utah beyond plaintiff's corporate domicile. Although FWC argues that it suffered the financial effects of these alleged torts in Utah where it is incorporated, we hold that under Calder and its progeny, the defendants' contacts with Utah are insufficient to establish personal jurisdiction in this case.[43]

The Fifth Circuit also took a strict approach under *Calder* in a case where it was unconvinced of two critical facts: (1) that plaintiff would feel the brunt of the injury caused by the defendant in Texas simply because plaintiff's principal place of business was in Texas; and (2) that the defendant's intent to interfere with the contractual relations of a company residing in Texas necessarily meant that USLICO had "expressly aimed" its tortious conduct at Texas.[44] The Fourth Circuit has also expressed similar concern over whether a court can automatically infer that a defendant expressly aimed its tortious conduct at the forum from the fact that that defendant knew that the plaintiff resided in the forum.[45]

Plaintiff, a Delaware corporation residing in South Carolina, brought suit in South Carolina alleging that the New Hampshire defendant participated in a conspiracy to appropriate plaintiff's trade secrets and customer lists. All the alleged coconspirators were either Florida or New Hampshire residents. The only South Carolina "contact" in the case was the defendant's

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[42]*See id.* at 1073-74.

[43]*Id.* at 1080.

[44]*Southmark Corp. v. Life Investors Inc.*, 851 F.2d 763 (5th Cir. 1988).

[45]*ESAB Group, Inc. v. Centricut, Inc.*, 126 F.3d 617 (4th Cir. 1997), *cert. denied*, 523 U.S. 1048, 118 S. Ct. 1364, 140 L. Ed. 2d 513 (1998).

knowledge that his acquisition of the trade secrets could result in lowered sales for the plaintiff.[46] The Fourth Circuit concluded that this knowledge alone did not "manifest behavior intentionally targeted at and focused on South Carolina" under *Calder*.[47] The court further reasoned that while it is true that a corporation "feels" lost sales at its headquarters, permitting *Calder* to be satisfied on this basis would mean that jurisdiction in intentional tort cases would always be appropriate in the plaintiff's home state, since the plaintiff always "feels" the impact of the tort there.[48] This reasoning goes against the grain of most U.S. cases that involve defamation or trademark infringement: Increasingly, U.S. Courts view such torts as having a specially strong impact in the place the Plaintiff resides.

The Eighth and First Circuits have both applied *Calder* strictly.[49] In contrast, the Seventh Circuit has adopted a more expansive reading of *Calder*.[50] Thus, in a Seventh Circuit case, plaintiff and defendant both sold mini shopping carts nationwide, plaintiff doing so from its base in Illinois, and defendant (through his company) from California. Defendant believed that he had a copyright in the cart design, and tried to use his copyright claim to "orchestrate an agreement" among all mini shopping-cart sellers.[51] Plaintiff resisted defendant's overtures, and defendant allegedly responded by threatening plaintiff's customers with suits for contributory copyright infringement. Plaintiff alleged that one such threat induced a customer in New Jersey to cease buying from plaintiff, which plaintiff contended was an intentional tort in Illinois sufficient to establish personal jurisdiction there under *Calder*.

The Seventh Circuit found that the Illinois court could properly exercise jurisdiction over the defendant, stating that after *Calder* "there can be no serious doubt . . . that the state in which the victim of a tort *suffers the injury* may entertain a suit against the accused tortfeasor."[52] The court further opined that since "a wrong does not become a 'tort' until an injury has occurred," the complained-of tort of interference with prospective economic advantage was not

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[46] *Id.* at 625.

[47] *Id.*

[48] *Id.* at 625-26.

[49] *General Electric Capital Corp. v. Grossman*, 991 F.2d 1376, 1387-88 (8th Cir. 1993) (concluding that *Calder* is of little help to a plaintiff where the "focal point of the alleged wrongdoing" occurred outside of the forum even where the "effects of the harm" occurred in that state); and *Noonan v. Winston Co.*, 135 F.3d 85, 90-91 (1st Cir. 1998) (holding that *Calder* test was not satisfied because defendants did not "target" forum, even though plaintiffs felt tortious effect there).

[50] *Janmark, Inc. v. Reidy*, 132 F.3d 1200 (7th Cir. 1997).

[51] *See* 132 F.3d at 1202; emphasis added. *See* notes 35-37 *supra* and accompanying text re Indianapolis Colts Case.

[52] *Janmark*, 132 F.3d at 1202.

completed until plaintiff's customer in New Jersey canceled his order.[53] Accordingly, the court concluded, the injury (and hence the tort) occurred in Illinois, and thus jurisdiction was properly laid there.[54] Like the Indianapolis Colts case discussed above, this mutation of *Calder* verges on the European approach to jurisdiction exemplified by the *Yahoo* case noted earlier and discussed at length in subsection VIII.A., *infra*.[55]

The Ninth Circuit has generally given a strict reading to *Calder*. In *Cybersell, Inc. v. Cybersell, Inc.*, discussed later in the text,[56] an Arizona plaintiff provided Internet marketing services through its website under the registered service mark "Cybersell." The Florida defendant provided business consulting services through its website under the same name. At the time the defendant chose the name "Cybersell," the plaintiff's website was not operational, and the Patent and Trademark Office had not granted plaintiff's application for the service mark.[57] Plaintiff instituted suit in the District of Arizona, alleging, *inter alia*, trademark infringement, and defendant moved to dismiss for lack of personal jurisdiction. The Ninth Circuit rejected the argument that jurisdiction was proper under *Calder*, reasoning that the defendant's website was "not aimed intentionally at Arizona knowing that harm was likely to be caused there."[58]

The test of "purposefully availing" oneself of the privilege of conducting business in the forum can be met if a party reaches beyond one state to "create continuing relationships and obligations with citizens of another state."[59] For example, taken alone, a single contract between a resident of the forum state and an out-of-state party may not establish sufficient minimum contacts to support personal jurisdiction. However, if there are added contacts such as telephone calls and mail into the forum state, the total contacts can collectively form a basis for jurisdiction over the nonresident.[60]

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[53] *Id.*

[54] *Id.*

[55] *See* notes 2-3, *supra*, and accompanying text, as well as subsection VIII.A., *infra*.

[56] 130 F.3d 414 (9th Cir. 1997).

[57] *See* 130 F.3d at 415.

[58] *Id.* at 420. In contrast is the Ninth Circuit's decision in *Panavision Int'l, L.P. v. Toeppen*, 141 F.3d 1316 (9th Cir. 1998), another cyberspace case, discussed *infra* at notes 141-144 and accompanying text, where the plaintiff already had an issued mark and the defendant's conduct was found willful.

[59] *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473 (1985) (quoting *Travelers Health Assn. v. Virginia*, 339 U.S. 643, 647 (1950)). *See also McGee v. International Life Insurance Co.*, 355 U.S. 220, 222-23 (1957).

[60] *Burger King Corp., supra*, 471 U.S. at 476. Once a nonresident has either purposefully directed activities to the forum state or has purposefully availed himself of the privilege of conducting activities in the forum, the

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### 3. In Rem Jurisdiction.

In rem jurisdiction involves jurisdiction over a thing rather than a person. Such jurisdiction gives the court the power to determine the rights of every person in the thing, such as issuing a judgment of title to land. Following its decision in *International Shoe*, the U.S. Supreme Court in *dicta* in *Shaffer v. Heitner* imported fundamental fairness considerations into in rem cases.[61]

## D. Choice of Law: A Comparison of U.S. and European Approaches to Choice of Law.

### 1. Choice of Law Differences Generally.

If more than one country can, consistent with domestic and international law, assert prescriptive jurisdiction, the choice as to which law to apply is determined by the forum's choice of law doctrine. However, the U.S. and Europe have pursued different approaches to this doctrine. In the U.S., more flexible approaches that analyze contacts between the forum and the dispute in issue, as well as examine policies that weigh the interests of different fora in having their own law applied to particular issues in controversy, have displaced earlier, more rigid formulas.[62] Thus, Section 6 of the Restatement (Second) of Conflict of Laws, followed by most American states, directs a court's attention, absent a statutory directive, to concerns similar to those found in the Restatement (Third) of Foreign Relations Law.[63]

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question of fairness must be considered. The Supreme Court has articulated five separate "fairness factors" that may require assessment to determine whether or not specific jurisdiction should apply. These factors include:

1. The burden on the defendant of defending in the forum;

2. The forum state's interest in adjudicating the dispute;

3. The plaintiff's interest in obtaining convenient and effective relief;

4. The interstate judicial system's interest in efficient resolution of controversies; and

5. The shared interest of the states in furthering substantive social policies. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980).

[61]*Shaffer v. Heitner*, 433 U.S. 186, 204-106 (1977).

[62]The earlier American approach is reflected in the FIRST RESTATEMENT OF CONFLICT OF LAWS. The newer flexible approach is set out in Section 6, RESTATEMENT (SECOND) OF CONFLICT OF LAWS.

[63]Compare Section 6.d. of the RESTATEMENT (SECOND) OF CONFLICT OF LAWS with Section 403, RESTATEMENT (THIRD) FOREIGN RELATIONS LAW. The concerns in Section 403 include:

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The American approach to jurisdiction over torts is summarized in Section 145 of the Restatement (Second) of Conflict of Laws: the law of the state with the most significant relationship to the occurrence and the parties is to be applied, taking into account such factors as where the injury occurred, where the conduct causing the injury occurred, the home of parties, and the place where any relationship between the parties is centered.[64]

When the parties have not expressly chosen the law to be applied to contract disputes, the Restatement (Second) of Conflict of Laws Section 188 provides that the law of the state with the most significant relationship to the issue should apply, taking into account where the contract was negotiated, entered into and to be performed, where the subject matter of the contract is and where the parties live.[65] Corresponding provisions of the EC Convention on the Law Applicable to Contractual Obligations (the "Rome Convention") provide that, absent contractual choice, the applicable law shall be that of the country with which the contract is most closely connected, which is presumed to be the habitual residence or principal place of business of the party who is to effect the performance that is deemed "characteristic of the contract."[66] If

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(a) the needs of the interstate and international systems,

(b) the relevant policies of the forum,

(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,

(d) the protection of justified expectations,

(e) the basic policies underlying the particular field of law,

(f) certainty, predictability and uniformity of result, and

(g) ease in the determination and application of the law to be applied.

Of the foregoing, needs of the interstate and international systems is perhaps the most significant. Choice-of-law rules should seek to harmonize relations between states and to facilitate commercial intercourse between them. In formulating rules of choice of law, a state should have regard for the needs and policies of other states and of the community of states. Rules of choice of law formulated with regard for such needs and policies are likely to commend themselves to other states and to be adopted by these states. Adoption of the same choice-of-law rules by many states will further the needs of the interstate and international systems and likewise the values of certainty, predictability and uniformity of result. Restatement (Second) of Conflict of Laws §6, comment d.

[64]The differences between the U.S. and European approaches are arguably more theoretical than real. The substantive law applied under modern contacts or interests analysis in the U.S. most frequently is the same law that would get applied under the doctrine of lex loci delicti. Under the purportedly formal European approach, questions regularly arise as to the where the harm occurred, for application of the tort choice of law rule.

[65]If the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied, except as otherwise provided in Sections 189-199 and 203.

[66]*EC Convention on the Law Applicable to Contractual Obligations* (June 19, 1980), 80/934/EEC, 1980 O.J. (L266) 1, Article 4(2).

the contract involves immovable property, it will be presumed that the country where the property is located has the closest connection to it.[67] With respect to the carriage of goods, the most closely connected country is the carrier's principal place of business, if it is also where the goods are loaded or discharged or the principal place of business of the consignor.[68]

Under the E.U. Proposal, a person domiciled in one Member State would be subject to suit in another Member State, in matters relating to a contract, in the place of performance, or in matters relating to tort, in the place where the harmful event occurred or there is a risk of it occurring.[69] This is not inconsistent with the U.S. approach.

Interestingly, Japan, like Europe, also focuses on where the place of the relevant act, without consideration of "various nexuses." For example, in tort cases the applicable law is that of the place where the facts giving rise to the claim arose, whereas in contract cases, absent party choice, the law of the place where the offer was dispatched governs.[70]

2. Pre-Dispute Contractual Choice of Law and Forum.

Many disputes involving electronic commerce arise between parties who are bound by a contract determining the terms and conditions upon which they have agreed to interact. Frequently, the online contract itself may provide that any dispute concerning it is to be heard in the courts of a specified state ("choice of forum" clause or "forum selection" clause) and is to be determined under the substantive law of a specified state ("choice of law" clause).[71]

Under the U.S. approach to contracts, summarized in Sections 186-188 of the Restatement (Second) of Conflict of Laws, contractual choice of law clauses will control unless the selected forum has no substantial relationship to the parties or transaction and is not otherwise reasonable, or use of the chosen law would violate a fundamental policy of a forum with a materially greater interest in the issue than that chosen and whose law would have applied under Section 188 of the Restatement had there not been a contractual choice.

Under the Rome Convention, contractual choice of law clauses are generally enforceable, but not where the contract is entered into by a consumer or where only one country is connected to the issues in dispute; in the latter situation, the contract will not preclude use of

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[67] *Id.* at Article 4(3).

[68] *Id.* at Article 4(4).

[69] E.U. Proposal, §2.

[70] Tokushige Yoshimura, *Jurisdiction Research*, available online at <www.kentlaw.edu/cyberlaw>.

[71] Contract terms themselves, of course, also supply a set of substantive rules to govern the transaction, which will be used by a court unless they violate the public policy of the forum.

that country's mandatory rules.[72] Thus, both the U.S. and European approaches embrace party autonomy as the basic rule, allowing contract parties to choose the law to be applied to contract disputes. However, both approaches allow significant exceptions, namely, public policy or absence of contact with the chosen law in the case of the U.S., and mandatory rules of the state of the consumer or the one with most significant contacts, in the case of the Rome Convention.

### 3. Consumer Contracts: Differing U.S. and European Views on Pre-Dispute Choice of Law.

If parties to the contract are presumed to have equal bargaining power and, therefore, an equal ability to accept or reject such clauses, the clauses are generally uncontroversial and enforced. However, equality between buyer and seller has not been presumed when one party to the contract is a consumer. Instead, the seller is assumed to define its market and set the terms of the contract for its own benefit. The buyer, in contrast, is assumed to be confronted with either (a) accepting the terms imposed by one of a limited number of sellers serving the buyer's market or (b) foregoing the purchase. In an attempt to protect the consumer from disadvantageous choice of forum and law clauses, the E.U. will enforce them only if they favor the consumer[73], although in the U.S. they are enforced unless they are "unreasonable."[74]

The principal difference arises from the contrast between the Rome Convention regarding consumer contracts and mandatory rules, and the doctrine of the *Carnival Cruise Lines* case,[75] which permits the enforcement against consumers of reasonable choice of forum clauses even in a contract of adhesion. Article 5 of the Rome Convention does not enforce the waiver by

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[72] *Id*. at Article 5. A mandatory rule is one that cannot be derogated from by contract. *Id.*, Article 7.

[73] Italy, for example, provides that the choice of any forum other than the consumer's domicile is deemed unfair and, therefore, unenforceable unless the seller can demonstrate the existence of dealings over that clause with the consumer. Similarly, the choice of the law of a non-E.U. country is void if the chosen law is less favorable to the consumer and the contract's closest connection is to an E.U. country. *See* Emilio Tosi, *Consumer Protection Under Italian Law*, available at <http://www.kentlaw.edu/cyberlaw/docs/foreign/>.

For a valuable discussion of these clauses and their treatment in Europe, *see* Gabrielle Kaufmann-Kohler, *Choice of Court and Choice of Law Clauses in Electronic Commerce*, in Vincent Jeanneret (dir.), Aspects Juridiques du Commerce Electronique, Zurich (Schulthess) 2000.

[74] *Carnival Cruise Lines, Inc.*, note 75 *infra*. However, when state law is applicable (*Carnival Cruise Lines* was an admiralty case, so federal law controlled), a court may as a matter of public policy refuse to enforce such clause. *See, e.g., Jones v. GNC Franchising, Inc.*, 211 F.3d 495 (9th Cir. 2000) (refusing to enforce Pennsylvania choice of forum clause against a California franchisee).

[75] *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991). *Carnival Cruise* Lines involved a forum selection clause in a consumer contract. Lower courts have extended its rule to choice of law clauses. *See, e.g., Haynsworth v. The Corporation*, 121 F.3d 956, 965 (5th Cir. 1997).

consumers[76] of mandatory laws of their habitual residence designed for their protection, although a choice of law clause may apply different law to other aspects of the contract and dispute. If there is no choice of law clause, Article 5 provides that the law to be applied is that of the consumer's habitual residence, unless the contract is one for carriage (other than an inclusive contract for travel and accommodation) or for provision of services exclusively in another forum. The E.U. Proposal is similar to the Rome Convention; it provides that:

> The autonomy of the parties to a contract *other than an employment, insurance or consumer contract* to determine the courts having jurisdiction must be respected. Contractual clauses electing jurisdiction between parties with unequal negotiating strength must, however, be regulated. [Emphasis added]

The E.U. Proposal adds:

> With particular regard to choice-of-jurisdiction clauses in consumer contracts, a review of the planned system will be conducted after the entry into force of this Regulation in the light of developments in non-judicial dispute-settlement schemes, which should be speeded up.

In the U.S., it is also possible, although not axiomatic, for public policy to override choice of law in consumer contracts.[77] Nonetheless, the policy is invoked much more seldom than in Europe. As we recognize the dramatic change in power parameters between supplier and consumer that the Internet creates (*infra*, Section IV), the notion that consumers are unable to make valid decisions on choice of law and forum becomes less defensible. Indeed, even "default" rules that make the consumer's residence the proper forum for disputes arising from a retail transaction need reexamination. As discussed in subsection III.C., *infra*, the E.U. members are still adhering to non-waivable consumer protection on choice of law, if not on choice of forum.

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[76]Covered consumers are those who were solicited, either individually or through advertising, in their forum and who there completed steps necessary by them for the formation of the contract and those who traveled elsewhere to place an order for goods at the arrangement of the seller for that purpose.

[77]Thus, *State ex rel Meierhenry v. Spiegel*, involved an action by South Dakota to recover interest charged by a nonresident seller which violated South Dakota's usury laws. The defendant, an Illinois-based mail-order enterprise, had offered credit sales through catalogues available in South Dakota. Because the credit agreements provided that they were to be governed by Illinois law, the trial court granted summary judgment for the defendant, ruling that the interest rates allowed by Illinois law, rather than those under South Dakota law, applied. The Supreme Court of South Dakota reversed, holding that the general rule, that parties to a contract may effectuate their own choice of law, was trumped by the public policy as expressed in the South Dakota usury statute, which made the provision of the credit agreement void. 277 N.W.2d 298 (S.D. 1979). *See also* the cases involving Internet click-wrap contracts at subsection IV.B.3., *infra*.

## III. The Effects of the Internet On Traditional Principles of Jurisdiction.

### A. Impacts Arising out of the Internet As It Exists in May 2002.

Basic principles have been essentially geographically based and have therefore been difficult to apply in the context of the Internet. A website can be viewed from any place in the world where there is access to the Internet. As a result, geographical location has less significance than previously in the context of jurisdiction. Information over the Internet passes through a network of networks, some linked to other computers or networks, some not. Not only can messages between and among computers travel along much different routes, but "packet switching" communication protocols allow individual messages to be subdivided into smaller "packets" which are then sent independently to a destination where they are automatically reassembled by the receiving computer.[78]

The actual location of computers among which information is routed along the Internet is of no consequence to either the providers or recipients of information, hence there is no necessary connection between an Internet address and a physical jurisdiction.[79] Moreover, websites can be interconnected, regardless of location, by the use of hyperlinks. Information that arrives on a website within a given jurisdiction may flow from a linked site entirely outside that jurisdiction.[80] For example, one packet of an e-mail message sent from California may travel via telephone line through several different states and countries on its way to Italy. Part of the "trip" may even go through a satellite in space. Meanwhile, another packet of the same message may travel by fiber-optic cable, arriving in Italy before the first packet, with both transmissions are completed in nanoseconds. Finally, notwithstanding the Internet's complex structure, the Internet is predominately a passive system; Internet communication only occurs when initiated by a user.

### B. Increased Conflicts Arising Out of Future Development of the Internet.

As earlier discussed, the rules of jurisdiction over activities in e-Commerce are evolving out of principles predating the Internet age. Repeatedly, courts and regulators have

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[78]*See* stipulated facts regarding the Internet in *American Civil Liberties Union v. Reno,* 929 F. Supp. 824, 830-32 (E.D. Pa. 1996).

[79]D. Johnson and D. Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1371 (1996).

[80]The Internet also uses "caching," *i.e.*, the process of copying information to servers in order to shorten the time of future trips to a website. The Internet server may be located in a different jurisdiction from the site that originates the information, and may store partial or complete duplicates of materials from the originating site. The user of the World Wide Web will never see any difference between the cached materials and the original. *American Civil Liberties Union v. Reno*, *supra*, 929 F. Supp. _____ at 848-49. ( Court).

analogized the Internet to telephone or print media in analyzing jurisdictional issues. Whether this approach should continue in the future is a serious issue, because the Internet of today is but a glimmer of what lies ahead in digital communications.

### 1. Evolution of New Technologies Could Further Diminish Territoriality.

While the new global marketplace incredibly complex, the growth and pace of change in digital communications are accelerating. Each minute, millions of e-mail messages are being sent around the world. For decades, Silicon Valley has been guided by Moore's Law, which states that the capacity of semiconductors will double every 18 to 24 months. In March 2002, Intel Corp.'s chief technology officer predicted the exponential growth of chip transistor density will continue at least another decade. As a keynote speaker at a trade show in Washington, D.C., he said Moore's Law has become a "self-fulfilling prophecy."[81] He professed "absolute confidence" that the IT industry would continue to exploit Moore's Law over the next 25 or 30 years, pointing to recent developments such as a 10-nanometer terahertz transistor with a dielectric layer only three atoms thick.

Two other technologies pushing the expansion of information-carrying capacity are photonics and wireless. Photonics employs light to move communications, and has been doubling the capacity of optical fiber every 12 months. This is dramatically changing the way networks are deployed.[82] Bandwidth (the amount of space available to carry the data and voice traffic that all these networks around us are building up) is also expanding exponentially. Instead of a resource in short supply, bandwidth may soon be an unlimited one.

Wireless is also fueling the communications revolution. While cell phones have gone from a curiosity to become commonplace, the real revolution will come when wireless broadband networks begin to serve as "fiberless" fiber to bring high-speed conductivity to places where it's too expensive or too difficult to lay fiber optic lines. Fixed wireless systems can now carry information many times more quickly than a computer's 56K modem. New technology will boost that capacity by another 10-20 times, opening up wide pipelines to carry voice, data, video and all of the pieces that comprise the growing network of networks. The system for creating, distributing, selling and consuming products is already turning upside down. Advertising, ordering, billing and trading are being swept into networks in an accelerating and

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[81]Patricia Daukantas, *Intel Exec: Moore's Law Keeps Going and Going*, WASHTECH.COM (March 19, 2002.

[82]*See* Carleton Fiorina, *The Communications Revolution*, Speech to Commonwealth Club of California, in COMMONWEALTH CLUB OF CALIFORNIA MONTHLY NEWSLETTER, July 19, 1999 [hereafter "*Fiorina*"]. One of the results will be to shrink the size and cost of an incredibly expanding range of communications devices. Bell Labs, for example, has a camera on a chip and a microphone on a chip. *Id.*

ever-widening fashion. Five percent of all global sales will be occurring online as early as 2004.[83]

In evaluating the impact of technology on the law of jurisdiction, we should add to the telecommunications revolution just described the new world of "bots." In Silicon Valley and elsewhere, more and sophisticated cyber-robots and other cyberagents are being developed. Bots with computerized artificial intelligence can be programmed with enormous amounts of information about the goals, preferences, attitudes and capabilities of their "cyber-principals." They can roam in virtual space without human intervention, endowed with such information and apply their artificial intelligence to conduct all manner of commercial, social and intellectual "transactions" with other bots and agents, day and night, while their principals are asleep or working on other things. Such bots in turn can appoint sub-agents, capable of speaking in multiple languages or ultimately communicating through a universal "computer-speak." Some expect that "an infinite number" of shopping bots will show up as electronic commerce expands, and that they will be able to respond to slight changes in Web-based auctions in a fraction of a second.[84] Indeed, competition to develop ever more sophisticated bots started for the first time in July 2000 in Boston.[85]

Thus, in contrast to the geographically-oriented and point-to-point lines between buyers and Sellers that have heretofore characterized traditional commerce and early E-commerce, E-commerce transactions will increasingly occur outside of any geographical place, in a truly "virtual world," by highly programmed agents without human intervention. For example, when a future investor engages in the use of Bots and other non-geographically based intermediaries it will be somewhat like the investor sending highly programmed, computer-driven spaceships into outer space to locate and "dock" at space stations for the purpose of conducting a transaction. It becomes harder to argue that the investor's home jurisdiction should control in preference to that of the space station operator or owner. The web participant who unleashes a bot into a digital environment awash with other Bots and virtual proxies arguably has "left" his geographical home, elected to transact in a different environment, and does not have a reasonable belief that the laws or courts of his home jurisdiction will apply. This makes it necessary to consider new, non-geographical or less geographical paradigms.

### 2. Technological Evolution Is Changing the Power Parameters.

The many existing jurisdictional rules applicable to commercial transactions reflect presumed power imbalances between buyers and sellers. Traditionally, sellers are thought to

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[83] Fiorina.

[84] *Id.*

[85] *Id.*

seek out buyers, manifesting their desire to benefit from a connection with the buyers forum, and to set the terms of the purchase contract.

However, power in the context of a commercial relationship depends upon knowledge and choice. Electronic commerce in the worldwide marketplace represented by the Internet inherently expands consumer choice, because it opens up every market to every buyer regardless of where the seller is located.[86] In the same vein, electronic commerce strengthens buyers *vis-a-vis* sellers because buyers gain more possibilities. Thus, the implied concern that buyers will be taken advantage of by sellers to whom they are tied by geographic or other limitations is less appropriate in the E-commerce arena.

While the Internet empowers the consumer, it also can reduces the seller's power to define its market. In traditional commerce, a seller defines its market, almost always far narrower than global, by its advertising strategy and budget, its investment in distribution channels, the physical locations of its goods or service-delivery points, and by its processes for taking orders. In E-commerce, absent substantial restrictive measures by the seller, every website is worldwide. As a result, a buyer is just as likely to search out a relatively passive distributor as an active distributor is to search out a passive consumer.

At the same time, inherently lower economic barriers to entry presented by E-commerce already have resulted in smaller distributors transacting business beyond a single geographic location. While this trend has some precedent in the catalogue and telephone businesses, the scale by which the Internet can reduce costs is an entirely new phenomenon. All of these factors undermine the assumption that most distributors are more powerful than most consumers. In E-commerce, indeed, many transactions may occur between very small enterprises and individuals. This suggests that the consumer law's concern with an imbalance in bargaining power may be less significant for Internet-based commerce.

The Internet also enables more buyers to purchase goods directly from the manufacturer. In the past, intermediaries such as distributors almost inevitably intervened between the manufacturer and consumers, adding cost to the transaction for what was often unclear added value. By making market pricing transparent, the Internet can substantially reduce the role of the merchant-intermediary.

Concededly, such a vast increase in sellers online can present consumers (and business buyers) with information overload and thereby negate the improved leverage otherwise generated by this new market structure. Moreover, the same database technologies that increase consumer choice can also help sellers more precisely target consumers, enabling sellers to trade on the fact of simple convenience. Nonetheless, technology may also address these problems.

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[86]Note that legal regulation may block some sellers from some markets.

"Bots," an increasingly feasible technology that puts the buyer in charge of the buying decision, are armed with great amounts of artificial intelligence, can be programmed with enormous amounts of information about the goods, preferences, attitudes and capabilities of their human "principals." In the future, they will be able to roam in cyberspace without human intervention, endowed with such information, and apply their artificial intelligence to conduct all manner of commercial, social and intellectual transactions with other bots. In turn, they can appoint sub-agents, capable of speaking in multiple languages or ultimately communicating through a universal "computer-speak."

3. Evolution in the Development and Use of Blocking Technologies.

In cyberspace as elsewhere, U.S. constitutional due process allows potential defendants to structure their conduct in a way to avoid the forum state.[87] At the same time, to assume that a website operator can entirely avoid a given jurisdiction is unrealistic. Because the web overflows all boundaries, the only way to avoid *any* contact whatsoever with a specific jurisdiction would be to stay off the Internet. For that reason, mere accessibility of a website sufficient to satisfy the American Fourteenth Amendment minimum contacts requirements, and site operators have been able to structure their site use to avoid a given state's jurisdiction. As discussed below, this reality has been recognized by regulators in the United States under federal securities laws.[88]

Increasingly, however, countries that wish to limit the social and political impacts of cyberspace are tracking and sometimes blocking the Internet activity of their residents. Although web filtering can be one method of restricting access to various Internet, to accomplish such restriction fully a country must have control over the means of communication. Control over the Internet "backbone" is the key here. In Saudi Arabia, the government filters all traffic through a central server.[89] All 30 ISPs in the country are linked to a ground-floor room at the Riyadh Internet entranceway, where all Saudi web activity is stored in massive cache files and screened.[90] The government in 2000 issued regulations banning access to sites considered subversive, contrary to the state or its system, or damaging to the dignity of the heads of state.[91] Nor can the Saudis use Yahoo chat rooms or Internet telephone services. Even a medical student

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[87] *World-Wide Volkswagen, supra*, note 60, 444 U.S. at 296.

[88] *See* subsection IV.B.3.(a) *infra.*

[89] Jennifer Lee, *Punching Holes in Internet Walls*, N.Y. TIMES (April 26, 2001) ["*Lee*"], online at <www.nytimes.qpass.com/qpass-archives/ . . . 001arc+dbname=!db!+TemplateName=doc.tmpl>. The restrictive approaches were surveyed by a French advocacy group, "Reporters Without Borders."

[90] Brian Whitaker, *Losing the Saudi Cyberware*, THE GUARDIAN (Feb. 26, 2001) online at <www.guardianunlimited.co.uk/elsewhere/journalist/story/0,7792,4432,61,00.html>.

[91] Lee, *supra*, note 89.

may not be able to access websites on human anatomy. (Saudi Arabia also blocks sites for financial reasons: its ban on Internet telephony favors its own state-run telephone monopoly.[92])

In late 2000, some Saudi residents found a way around the government blockade: by masking the online destination of the web surfer, a small company in California called SafeWeb allowed people in Saudi Arabia and other restrictive countries to view any website. Shortly after the Saudis discovered this side door, the number of page-views through the SafeWeb site by Saudis jumped to tens of thousands per day.[93] But by mid-November 2000, the Saudi government cut off access to SafeWeb from within the country, and the number of page-views dropped from 70,000 per day to zero. Via e-mail, SafeWeb directed Saudi users to another new technology that could let them get around the blockades, and the number of Saudi users once again climbed.[94]

Almost all of the censoring governments exercise control through central gateways. Saudi Arabia spent two years developing the hardware and software necessary to filter almost all Web data entering the country through a central server. Residents can circumvent government controls by connecting to the Web through foreign-based servers and through satellite phones or by using the file transfer protocol. But those methods require either money or some computer expertise.[95]

Reporters Without Borders, the media rights advocacy group based in France, estimates that at least 20 countries significantly restrict Internet access. Many of them are engaged in cat-and-mouse struggles over web access similar to Saudi Arabia. Thus, Singapore and the United Arab Emirates force all Internet traffic through a single gateway. The Singapore Broadcasting Authority since 1996 has regulated access to content by licensing both domestic websites and ISPs. The ISPs must install "proxy servers," which filter out content deemed objectionable by the government. The service providers are required to block access to sites that

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[92] *Id.*

[93] *Id.*

[94] *Id.*

[95] Jim Hu & Evan Hanson, Yahoo Auction Case May Reveal Borders of Cyberspace, C/NET NEWS.COM (Aug. 11, 2000) ["Hu & Hanson"], online at <http://news.cnet.com/news//0-1005-200-2495751.html>. IP addresses use 32-bit codes, providing a possible 4.26 billion combinations. The codes are assigned in blocks to ISPs, which are organized geographically, thus making it possible to map most IP addresses with a relatively high degree of accuracy. *Id.*

the government consider to undermine public security, racial and religious harmony or public morals.[96]

China, which controls the Internet backbone by control over both competing national carriers, has decentralized Internet access, but requires all Internet service providers to block sites.[97] The restrictions usually work by blocking the Internet Protocol addresses of specific websites, rather than by filtering site content.[98] CNN's site is blocked in China, for example. If a requested site is on the banned list, access is denied and the user receives an error message. In theory, that user could also be traced.[99] Filters have also been used in China by ISPs to block the websites of other Western media outlets, Taiwanese and Hong Kong newspapers, human rights groups and Falun Gong, (the banned spiritual movement).[100]

In Britain, the Regulation of Investigatory Powers Act, enacted last year, extends police phone-tapping privileges to the Internet. When asked, companies and individuals are obliged to help law enforcement officials decode lawfully obtained data.[101] In Russia, the government has instituted an Internet surveillance system that requires ISPs and telephone operators to reroute data traffic to local law enforcement headquarters, allowing authorities to monitor phone calls or e-mail.[102]

Several companies offer technology for tracing the approximate physical location of an Internet user, a key component for any potential filtering techniques based on geography, although not the only requirement. In June 2000 Akamai Technologies, a provider of networking services, began offering customers a service called "EdgeScape," which could trace the physical position of servers that hand out the numeric codes, or Internet Protocol (IP) addresses, used to route signals over the Web to people's computers. Akamai said the service could find a web user within a particular country, as well as a state or province in the United States and Canada. It also said it has plans to track people anonymously within ZIP codes, but more detailed information such as street addresses cannot be obtained from IP addresses alone.[103]

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[96]U.S. Department of State, *County Reports On Human Rights Practices 2000*, Singapore §2a (2001) ["State Department Report"].

[97]*Id.*

[98]*Id.*

[99]*Id.*

[100]*Id.*

[101]*Id.*

[102]*Id.*

[103]Hu & Hanson.

On the other hand, "anonymizer" tools exist online designed to shield the personal identity of web surfers as well as locations of their ISPs. Thus, Zero Knowledge's Freedom Network scrambles web traffic and sends it though a series of detours, making it difficult or impossible to determine the origin of requests.[104] The Freenet network and AT&T's Publius publishing system are also designed to maintain absolute anonymity for content publishers and surfers, although they do not extend to the entire Web.

In addition to Akamai, NetGeo has developed beta software that ties IP addresses to geographical locations. Its co-founder said the service could be used to create a filter system for content-based screening on countries, and claimed that the service is 98 percent accurate.[105] He admitted that the service is not foolproof, however; for example, if someone in Boston were to connect to an ISP located in France, NetGeo would identify that person as a French user.[106]

In addition to SafeWeb (<www.safeweb.com>), other programs that counter government restrictions include those provided by Anonymizer (<www.anonymizer.com>), SilentSurf.com (<www.silentsurf.com>) and the Cloak (<www.the-cloak.com>). During the conflict in Kosovo in 1999, for example, Anonymizer, based in San Diego, set up free services so that Kosovo residents could communicate with less fear.[107]

Many privacy-protection websites work by inserting themselves as an intermediary and masking the Internet addresses of users' computers. If a user in a country with web censorship goes to a privacy-protection site, that site becomes a shell that can be used to explore the web.[108] If the user types in the address of a banned site, the government will see the user's destination as the privacy- protection site that is the intermediary. So while a user officially remains at the SafeWeb site, for example, the site has an embedded frame that gives unfiltered web access.[109]

Once a government is alerted to the use of an "anonymizer" site, they can shut off access to the sites; in March 2000, for example, the Chinese government banned a number of such sites, including SafeWeb, which had become popular with Falun Gong religious followers. Anonymizer combats such controls by changing its I.P. addresses and cycling through domain names every few months. (Its users get e-mail notices telling them the new names and

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[104] *Id.*

[105] *Id.*

[106] *Id.*

[107] *Id.*

[108] *Id.*

[109] *Id.*

addresses.) Since governments typically are not very agile, it takes them time to block new sites.[110] Eventually, governments can catch up, which means that the privacy-protection companies must continually develop new strategies to keep ahead of the blocking technology.

eBay in late 2000 began testing in France a new software designed to deal with the Nazi memorabilia problem.[111] Its software would check the browser of each eBay user and when the person is using a French-language site and makes a request likely to turn up Nazi material, the query would be ignored and the person will not receive any information.[112] However, a French citizen could still search undetected by using an English-language browser, by registering both a foreign ISP, or by connecting through sites using a program like the "anonymizer" services that prevent the server from identifying IP address of the viewer.[113] As of early 2002, technology had not advanced to the point where a website can detect the identity of all viewers who seek access to it.

These technologies do not mean that website operators can readily mask access from any country they want to avoid. Yahoo, for example, has not seen these technologies as any possible solution to its French dilemma; it asserted in 2000 that a much higher degree of accuracy would be required than was then currently available, as well as a means for tracking the citizenship of individuals and their tastes.[114] "This is a battle at the level of the architecture," said Lawrence Lessig, the Stanford University Law School professor who is highly visible in cyberspace issues, at the time, "[i]t is the code of cyberspace that gives privacy and takes it away."[115]

## IV. How United States Courts Apply Traditional Jurisdictional Principles to E-commerce.

### A. Jurisdictional Precedents Arising From Print, Telephone and Radio Cases.

From the onset, courts assessing Internet jurisdiction had precedents involving print, telephone and radio media to use in determining whether jurisdiction over specific activities offends constitutional due process. These precedents relate primarily to the intent with which the Internet is used. Thus, if an Internet-based news service were to send a number of messages

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[110] *Id.*

[111] Tyler Cunningham, *Internet Liberté*?, S.F. DAILY JOURNAL (Jan. 18, 2001), 1, 5.

[112] *Id.*

[113] *See* discussion of anonymizers *supra* at notes 104-109 and accompanying text; *see also* Julien Mailland, *Freedom of Speech, the Internet, and the Cost of Control: The French Example*, 33 N.Y.U.J. Int'l L. & Pol. 1179 (2001) ["Mailland"], 1210, note 120.

[114] *Id.*

[115] *Id.*

specifically addressed to residents of a forum, there would be "purposeful direction" into the forum. Purposeful direction can exist on the 'Net even though, in contrast to shipment of some physical goods into a state as occurred in *Calder* (from which the shipper was deemed to foresee an effect in that state), nothing is shipped physically over the Internet.[116] E-mail over the Internet can be logically compared to traditional postal mail and to phone calls.

Bulletin boards and websites are not directed to a place or even to a point in virtual space, in contrast to e-mail. The person who posts a bulletin board message knows that the message can be resent by others elsewhere in the world, but the posting person cannot control such redistribution. A website is even more of a passive medium, because it sends nothing specifically directed to the forum state. The site merely posts general information so viewers can log on to the site. As the cases have increasingly recognized, websites are similar to advertisements beamed to the world over television. Perhaps an analogy to the size of the *National Enquirer's* circulation in California could be drawn from the number of hits on the website that emanate from viewers in a forum state. Since a site operator can identify the source of "hits" on his site, the operator would know whether a large proportion of the hits came from California. If information about a California resident were posted on the site, it might then be argued under *Calder* rationale that the operator purposefully directed the information to California residents. However, this would arguably be like basing jurisdiction over a telecast on the number of viewers in a given jurisdiction.

### B. Specific Jurisdiction on the Internet.

#### 1. Early Evolution of Internet Caselaw in the U.S.

##### (a) The "Inset" Case.

The early cases involving jurisdiction over cyberspace in the U.S. were marked not only by inconsistencies, but also by failure to appreciate the technological realities of the new medium. One example was a decision of the Connecticut federal court in 1996. Inset Systems sued Instruction Set ("ISI") in Connecticut (Inset's home) for trademark infringement.[117] Even though ISI had no assets in Connecticut and was not physically transacting business there, the district court determined that it had specific personal jurisdiction over ISI in Connecticut. It based its determination on ISI's use of a toll-free telephone number and the fact that there were at the time 10,000 Internet users in Connecticut, all of whom had the ability to access ISI's website. It found the advertising to be "solicitation of a sufficient[ly] repetitive nature to satisfy" the requirements of Connecticut's long-arm statute, which confers jurisdiction over foreign

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[116] *See* discussion of *Calder v. Jones* and related cases at notes 30-56, *supra* and accompanying text.

[117] *Inset Systems, Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161 (D. Conn. 1996) (herein "*Inset*").

corporations on a claim arising out of any business in Connecticut.[118] The court also held that the minimum contact test of the due process clause of the Fourteenth Amendment was satisfied, reasoning that defendant had purposefully "availed" himself of the privilege of doing business in Connecticut in "directing" advertising and its phone number to the state, simply because subscribers could access the website.

What the *Inset* court failed to appreciate adequately (just as the Paris court in the *Yahoo* case failed to appreciate four years later), was that any website can be accessed worldwide by anyone at any time. Moreover, it failed to give weight to the lack of evidence that any Connecticut residents actually had accessed the site or made a toll-free call to ISI.[119] Under the court's line of reasoning, any website would be subject to jurisdiction everywhere just by virtue of being on the Internet.

### (b) The *Zippo* and *Cybersell* Cases: the Sliding Scale of Online Interactivity.

Also in 1996, a Pennsylvania federal court delivered the first decision in the United States that included an overall analytical framework to test specific personal jurisdiction based on Internet activity. In *Zippo Mfg. Co. v. Zippo Dot Com. Inc.* ("*Zippo*"),[120] the court created a "continuum," or sliding scale, for measuring websites, which fall into one of three general categories: (1) passive, (2) interactive, or (3) integral to the defendant's business. The "passive" website is analogous to an advertisement in Time magazine; it posts information that is generally available to any viewers, who has no on-site means to respond to the site. Courts ordinarily would not be expected to exercise personal jurisdiction based solely on a passive Internet website, because to do so would not be consistent with traditional personal jurisdiction law.[121] An "integral" website is at the other end of the continuum: it is used actively by the operator to conduct transactions with persons in the forum state, receiving on-line orders and pushing confirmation or other messages directly to specific customers. In such cases, traditional analysis supports personal jurisdiction. The middle category, or "interactive" website, falls between passive and integral. It allows a forum-state viewer to communicate information back to the site,

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[118] *Id.* at 164.

[119] *Id.* The court deemed web posting to be "solicitation" within Connecticut.

[120] 952 F. Supp. 1119, 1124 (W.D. Pa. 1996).

[121] Only a handful of reported cases to date have based personal jurisdiction essentially on website accessibility alone, including : (1) *Inset*, discussed at notes 117-119 and accompanying text, and (2) *Telco Communications Group, Inc. v. An Apple A Day, Inc.*, 977 F. Supp. 404 (E.D. Va. 1997). (Relying on *Inset* to hold that personal jurisdiction existed over defendant for defamation claim solely on basis of website which "could be accessed by a Virginia resident 24 hours a day"); *Bunn-O-Matic Corp. v. Bunn Coffee Service, Inc.*, 1998 U.S. Dist. LEXIS 7819 (C.D. Ill. Mar. 31, 1998) (although court in essence used an "effects" test, saying defendant was aware of impact of infringing mark on Illinois).

by toll-free telephone number, regular mail or even e-mail. Under *Zippo*, exercise of jurisdiction in the "interactive" context is determined by examining the level of interactivity and the commercial nature of the site. Because in *Zippo* a non-resident California defendant operated an integral website that had commercial contacts with 3,000 Pennsylvania residents and Internet service providers, the court had no difficulty finding jurisdiction.

The first federal appellate court decision involving specific jurisdiction in cyberspace was *Cybersell, Inc. v. Cybersell, Inc.* ("*Cybersell*"), alluded to earlier.[122] Here, the Ninth Circuit Court of Appeals, in contrast to the Connecticut federal court in the *Inset* case, rejected the notion that a home page "purposely avails" itself of the privilege of conducting activities within a jurisdiction merely because it can be accessed there.[123] The plaintiff in *Cybersell* was an Arizona corporation that advertised its commercial services over the Internet. The defendant was a Florida corporation offering web page construction services over the Internet. The Arizona plaintiff alleged that the allege Florida trademark infringer should be subject to personal jurisdiction of the Federal court in Arizona because a website which advertises a product or service is necessarily intended for use on a worldwide basis. In finding an absence of jurisdiction, the Ninth Circuit used a *Zippo*-type analysis without specifically adopting *Zippo*. First, the court articulated a three-part test for determining whether a district court may exercise specific jurisdiction over a nonresident defendant:

> (1) The nonresident defendant must do some act or consummate some transactions with the forum or perform some act by which he purposefully avails himself of the privilege of conducting activities in he forum, thereby invoking the benefits and protections[;] (2) the claim must be one which arises out of or results from the defendant's forum-related activities[; and] (3) exercise of jurisdiction must be reasonable.

Applying the foregoing principles, the Ninth Circuit concluded that the Florida defendant had conducted no commercial activity over the Internet in Arizona. The Ninth Circuit found that posting an "essentially" passive home page on the Web using the name "Cybersell" was insufficient for personal jurisdiction. Even though anyone could access defendant's home page and thereby learn about its services, that this fact alone was not enough to find that the Florida defendant had deliberately directed its merchandising efforts toward Arizona residents.[124] Accordingly, defendant's activities over the Internet were insufficient to establish "purposeful availment." In so ruling, the Ninth Circuit observed that if all that were needed for jurisdiction was a web page, every complaint arising out of alleged trademark infringement on the Internet

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[122] 130 F.3d 414 (9th Cir. 1997). *See* notes 56-58 *supra* and accompanying text.

[123] *Id.* at 420.

[124] *Id.* at 419.

would automatically result in personal jurisdiction wherever the plaintiff's principal place of business is located.[125]

After *Zippo* and *Cybersell*, subsequent case law showed courts increasingly reluctant to grant jurisdiction merely on the basis of the number of potential customers in the forum jurisdiction who can access a passive website even where accessibility is accompanied by other means of communicating with the site operator or a small amount of other contacts with the forum.[126] Indeed, the Connecticut Superior Court, without even a reference to the Connecticut

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[125]*Id*. at 420.

[126]Among the increasing number of cases since *Zippo* that have declined to find jurisdiction are: *Fugazy International Travel Group, Inc. v. Fugazy Executive Travel, Inc.*, 2001 WL 50936 (S.D.N.Y.) (In trademark infringement action, no jurisdiction where substantial part of acts giving rise to claim did not occur in New York; fact that defendant's Internet site could be accessed from New York "does not alone" support jurisdiction absent "targeting of business" in New York); *Purchased Parts Group, Inc. v. Royal Appliance Manufacturing Co.*, 2000 WL 33125340 (Tenn. Ct. App. October 11, 2000) [hereafter "*Purchased Parts*"] (no specific jurisdiction in Tennessee although website posted and accepted information and processed orders, its "800" number accepted orders, it marketed and sold product in Tennessee through local retailers; general jurisdiction also rejected); *Liberty Aircraft v. Atlanta Jet, Inc.*, 2000 WL 1682500, 28 Conn. L. Rep. 398 (discussed at note [106], *infra*); *Holiday v. 3Com Corp*., 2000 WL 1796535 (D. Wyo.) (where no specific jurisdiction over employment dispute because no substantial in-state activity related to plaintiff's claim, general jurisdiction could not be based on operating a website capable of being accessed in Wyoming; no indication that any transactions occurred); First Financial Resources v. First Financial Resources Corp., ___ F. Supp. 2d ___ (N.D. Ill. 2000) (website which was slightly more than passive because it allowed clients of financial planner to exchange information via e-mails still insufficient for jurisdiction); *American Information Corp. v. American Infometrics, Inc.*, __ F. Supp. 2d ___, 2001 WL 370109 (D. Md.) ("an entirely passive Web site cannot create jurisdiction in Maryland simply because it is theoretically available to Web users in Maryland and everywhere else," even if site "uses someone else's trademark as an address"; ability to submit inquiry on availability of services in viewer's area not significant); *America Online, Inc. v. Chih Hsien Huang*, 2000 U.S. Dist. LEXIS 10232 (E.D. Va.) (defendant's only contact with Virginia was through domain name registration made with Virginia registrar); *Heathmart E.A. Corp. v. Technodrome.com*, 200 U.S. Dist. LEXIS 10591 (E.D. Va.) (same holding); *Chiaphua Components Limited v. West Bend Company*, 95 F. Supp. 2d 505 (E.D. Va., Norfolk Div. 2000); *Mid City Bowling Lanes & Sports Palace, Inc. v. Ivercrest, Inc.*, 1999 WL 76446 (E.D. La.), ___ F. Supp. 2d ___ (1999) (an advertisement on website held essentially "passive"); *Pheasant Run, Inc. v. Moyse*, 1999 WL 58562 (N.D. Ill.), ___ F. Supp. 2d ___ (1999) (advertisement on website containing defendant's telephone number); *Mink v. AAAA Devel. L.L.C.*, 190 F.3d 333 (5th Cir. 1999) ["*Mink*"] (website with printable mail-in form, toll-free call-in number and e-mail address insufficient for specific personal jurisdiction); *People Solutions, Inc. v. People Solutions, Inc*., 2000 U.S. Dist. LEXIS 10444 (N.D. Tex.) (no jurisdiction where defendant's website merely had potential to interact with and sell to Texas residents); *Minge v. Cohen*, 2000 WL 45873 (E.D. La.) (maintaining website alone is insufficient to confer personal jurisdiction); *Search Force Inc. v. Dataforce International Inc.*, 2000 U.S. Dist. LEXIS 12790 (S.D. Ind.) (utilizing interactive Internet service to post information under allegedly infringing mark does not confer personal jurisdiction); *Millenium Enterprises, Inc. v. Millenium Music, L.P.*, 1999 WL 27060 (D. Ore.), ___ F. Supp. 2d ___ (1999) (interactive website was not targeted at Oregon viewers and had no significant sales in Oregon); *Origin Instruments Corp. v. Adaptive Computer Systems, Inc.*, 1999 WL 76794 (N.D. Tex.) ___ F. Supp. 2d ___ (1999) (no jurisdiction where "moderate level" of interactivity); *ESAB Group, Inc. v. Cetricut, LLC*, 1999 WL 27514 (D.S.C.) ___ F. Supp. 2d ____; *Blackburn v. Walker Oriental Rug Galleries*, 1998 U.S. Dist. LEXIS 4517 (E.D. Pa. 1998) (website illustrating various types of rugs sold by plaintiff was passive

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advertisement and hence without message by e-mail is not enough to demonstrate the nature and quality of the commercial activity in the jurisdiction more did not form continuous and substantial contacts with the forum sufficient for general jurisdiction hyperlink allowing readers to send); *Transcript Corp. v. Doonan Trailer Corp.*, 1997 U.S. Dist. LEXIS 18687 (N.D. Ill., Nov. 17, 1997) (in trademark infringement action, website was just a general advertisement accessible worldwide, with no particular focus on Illinois); *No Mayo-San Francisco v. Memminger*, 1998 U.S. Dist. LEXIS 13154 (N.D. Cal. 1998) (merely registering someone else's trademark as a domain name and posting it on a website not sufficient by themselves to subject a party in Hawaii to jurisdiction in California); *CFOS 2 GO, Inc. v. CFO 2 Go, Inc.*, 1998 WL 320821 (N.D. Cal. June 5, 1998) (defendant's website and e-mail addresses for communication over the Internet insufficient in trademark suit to establish that the defendant had purposefully availed itself of the privilege of conducting activities within plaintiff's home state, relying on *Cybersell*); *K.C.P.L., Inc. v. Nash*, 49 U.S.P.Q.2d 1584, 1998 WL 823657 (S.D.N.Y. Nov. 24, 1998) (court lacked personal jurisdiction over alleged cyberpirate who allegedly registered domain name for sole purpose of extorting money from plaintiff in exchange for the assignment of all rights in the name, where the defendant resided in California and had no contacts with New York whatsoever, and there were no allegations that defendant sought to encourage New Yorkers to access his site or that he conducted business in New York); *Conseco, Inc. v. Hickerson*, 698 N.E. 2d 816 (Ct. App. Ind. 1998) (Hickerson's use of Conseco's trademarked name in the text of its website not sufficient to support personal jurisdiction in Indiana over resident of Texas where mention of Conseco in website was made without any other contact with Indiana); *Patriot Systems, Inc. v. C-Cubed Corporation*, 21 F. Supp. 2d 1318 (D. Utah 1998) (although court determined that C-Cubed was transacting business with Utah by virtue of its license relationship with Folio, headquartered in Utah, and payment of royalties to Folio in Utah, there was insufficient nexus between the claims in the lawsuit and C-Cubed's other contacts with Utah for specific personal jurisdiction over the Virginia company; website was passive advertisement, merely providing information to those interested in it); *Edberg v. Neogen Corporation*, 17 F. Supp. 2d 104 (D. Conn. 1998) (defendant's website had hypertext links that permitted users to learn about Neogen products, order product information through an online catalog, e-mail specific comments or questions to or from Neogen representatives, and order products through a toll-free "800" telephone number; but there was no act purposefully directed towards the forum state, any evidence that anyone in Connecticut purchased any product of Neogen through its website or that any website advertisement of Neogen was directed to Connecticut); *Osteotech, Inc. v. Gensci Regeneration Sciences, Inc.*, 6 F. Supp. 2d 249 (D.N.J. 1998) (Internet advertisements and websites easily accessible from computers in New Jersey were insufficient proof by themselves of purpose availment in New Jersey, even with a phone number and e-mail address on the website); *Bancroft & Masters, Inc. v. Augusta National, Inc.*, 1998 U.S. Dist. LEXIS 22025 (N.D. Cal. 1998) (domain name dispute, website not enough for specific or general jurisdiction California); *Black & Decker (U.S.) Inc. v. Pro-Tech Power Incorporated*, 26 F. Supp. 2d 834 (E.D. Va. 1998) (patent suit, fact that defendants advertised their products on website accessible to Virginia residents and provided interested customers in Virginia with their e-mail addresses, not enough to show purposeful availment for personal jurisdiction); *Advanced Software, Inc. v. Datapharm, Inc.*, 1998 U.S. Dist. LEXIS 22091 (C.D. Cal. Nov. 3, 1998) (no jurisdiction over Datapharm in California where it had website with the domain name of datapharm.com and links to other pharmaceutical sites such as the FDA, offered visitors to the site the ability to send it e-mail by clicking on a hyperlink, listed Datapharm's address and provided an "800" telephone number); *3D Systems, Inc. v. Aarotech Laboratories, Inc.*, 160 F.3d 1373, 48 U.S.P.Q.2d 1773 (Fed. Cir. 1998) (no jurisdiction over parent of alleged patent infringer where it only maintained a website accessible by California residents that was merely passive and it did not purposefully direct any of its activities at California residents); *Cybersell Inc. v. Cybersell Inc.* (9th Cir. 1997) (mere accessibility by Arizona resident to passive, Florida-based website); *Bensusan Restaurant Corp. v. King*, 937 F. Supp. 295 (S.D.N.Y. 1996) (Missouri defendant based on a website advertising the defendant's nightclub; no evidence that sales were made or solicited in New York or that New Yorkers were actively encouraged to access the site); *Smith v. Hobby Lobby Stores, Inc.*, 968 F. Supp. 1356, 1365 (W.D. Ark. 1997) (no general jurisdiction where Hong Kong

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federal court's opinion in *Inset*, ruled in 2000 that specific jurisdiction could not be based on the mere accessibility within Connecticut of a website operated from Georgia.[127] However, both before and after the acceptance of *Zippo* in most courts, the reported cases reflect inconsistencies, such that one court may find jurisdiction on facts that another court will find insufficient.[128]

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manufacturer of artificial Christmas tree advertised on the Web, but tree was purchased from a retailer in Arkansas); *McDonough v. Fallow McElligott, Inc., supra*, note [1] (mere accessibility of Missouri website by Californians insufficient for general personal jurisdiction); *Hearst v. Goldberger*, 1997 WL 97097 (S.D.N.Y. 1997) (no specific jurisdiction where New Jersey site was accessible to and visited by New Yorkers, where no sales of goods or services had occurred).

[127]*Liberty Aircraft v. Atlanta Jet, Inc.*, 28 Conn. L. Rep. 398 (2000). The court stated that "[f]undamental notions of fairness lead the court to conclude that the defendant did not intend to subject itself to every jurisdiction in which its general advertisement reached." 28 Conn. L. Rep. at 401.

[128]Thus, in contrast to some of the fact situations in the cases cited at note 126, *supra*, personal jurisdiction was found to exist in: *Starmedia Network, Inc. v. Star Media Inc.*, 2001 WL 417118 (S.D.N.Y.) (site deemed "interactive" because, while customers could not purchase products online, they could register, send comments, and obtain special price information, and defendants "could reasonably expect its actions to have consequences in New York"); *Divicino v. Polaris Industries*, 129 F. Supp. 2d 425 (D. Conn. 2001) (specific jurisdiction in product liability case where in addition to website with toll free number, advertisements on site indicated reasonable expectation that defendant's goods would be used in Connecticut); *Multi-Tech Systems, Inc. v. VocalTec Communications, Inc.*, 122 F. Supp. 2d 1046 (D. Minn. 2000) (specific personal jurisdiction based on "moderately interactive" website that allowed Minnesota residents to register, download and use Internet phone software and emphasizing use of a click box on the website for "States (U.S. only)" that listed all states in the U.S.); *Nida Corp v. Nida*, 118 F. Supp. 2d 1223 (M.D. Fla. 2000) (accessibility of website in Florida plus placing of one industry-specific advertisement and small percentage of sales in Florida sufficient for jurisdiction); *Publications Intern., Ltd. v. Burke/Triolo, Inc.*, 121 F. Supp. 2d 1178 (N.D. Ill. 2000) (*Zippo* used to find jurisdiction over interactive website which posted information and allowed users to fill out and submit catalog requests, even though no actual sales made online, plus defendant maintained representative in Illinois); *Peridyne Tech. Solutions, LLC v. Matheson Fast Freight, Inc.*, 117 F. Supp. 2d 1366 (N.D. Ga. 2000) (defendants illegally hacked into plaintiff's servers and directories in Georgia to download proprietary information and access plaintiff's source codes); *Hsin Ten Enterprises USA, Inc. v. Clark Enterprises*, ___ F. Supp. 2d ___ (S.D.N.Y. 2000) (applying the *Zippo* test to find jurisdiction where viewers could purchase infringing exercise machine online, download forms and query online representatives); *Archdiocese of St. Louis v. Internet Entertainment Group, Inc.*, 1999 WL 66022 (E.D. Mo.) ___ F. Supp. 2d ___ (1999) (operator of adult site intended to reach Missouri residents in connection with papal visit to St. Louis); *GTE New Media Services, Incorporated v. Ameritech Corporation*, 21 F. Supp. 2d 27 (D.C., D.C. 1998) (telephone companies increased advertising revenue by channeling District of Columbia viewers to their websites); *American Network Inc. v. Access America/Connect Atlanta, Inc.*, 975 F. Supp. 494 (S.D.N.Y. 1997). (Georgia Internet service provider sued in New York for trademark infringement had 7,500 customers worldwide, including six in New York who paid $150.00 per month in the aggregate, and defendant sent software and agreements to sign to new customers; court found "purposeful availment" in the New York forum); *Telco Communications v. An-Apple-A-Day*, 977 F. Supp. 404 (E.D. Va. 1997) (defendant's Web page along with the other contacts with Virginia held enough for jurisdiction over defendants, who posted allegedly defamatory press releases regarding plaintiffs on a passive Internet site*); Cody v. Ward*, 1997 U.S. Dist. LEXIS 1496 (D. Conn. Feb. 4, 1997) (California

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defendant's telephone and e-mail transmissions to a Connecticut plaintiff for the purpose of inducing the plaintiff to purchase securities was enough to exercise personal jurisdiction under Connecticut statute); *Telephone Audio Productions, Inc. v. Smith*, 1998 U.S. Dist. LEXIS 4101 (N.D. Tex. March 26, 1998) (although defendants' acts failed to rise to the level necessary for the court to have general jurisdiction over the defendants, they were sufficient for specific jurisdiction where defendants maintained a website to promote their business with a registered trademark owned by plaintiff; the web-page with the allegedly infringing mark was accessible to Texas residents and defendants used the infringing mark at a trade show in Texas and received orders from distributors in Texas, hence the combination of the website and other contacts with Texas were sufficient for jurisdiction); *Mieczkowski v. Masco Corp.*, 997 F. Supp. 782 (E.D. Tex. 1998) (nature of the manufacturer's website which had a "Shop Online" page, offering customers an opportunity to check the status of their purchases and providing for direct on-line communications with sales representatives, combined with other factors such as the volume of business conducted in the state, provided a basis for asserting *general* personal jurisdiction over a bunk bed manufacturer); *Clipp Designs, Inc. v. Tag Bags, Inc.*, 996 F. Supp. 766 (N.D. Ill. 1998) (Personal jurisdiction found in trade dress infringement action where defendant was alleged to have solicited orders for its locket tag protector in Illinois and advertised the device on its website and through a national magazine); *Bunn-O-Matic Corp. v. Bunn Coffee Service, Inc.*, 1998 U.S. Dist. LEXIS 7819 (C.D. Ill. March 31, 1998) (allegedly infringing marks used on defendant's passive website, which provided only general information, did not allow customers to place orders by accessing the site had no Illinois resident who accessed site for contest to obtain free coffee or used its toll-free telephone numbers and, other than its website, defendant did not advertise, sell or ship any of its goods or services in Illinois; nonetheless, defendant's actions in setting up a website accessible to residents of plaintiff's home state of Illinois held to meet the low threshold for jurisdiction where the defendant was on notice that its use of an infringing mark would cause injury to an Illinois resident); *Blumenthal v. Drudge*, 992 F. Supp. 44 (D.D.C. 1998) (personal jurisdiction in District of Columbia over Drudge, a California resident, based on: (1) interactivity of the website between defendant Drudge and D.C. residents; (2) the regular distribution of the "Drudge Report" via AOL, email and the World Wide Web to D.C. residents; (3) Drudge's solicitation of and receipt of contributions from D.C. residents; (4) the availability of Drudge's website to D.C. residents 24 hours a day; (5) Drudge's interview with C-SPAN in D.C.; and (6) Drudge's contacts with D.C. residents who provided gossip for his Drudge Report, which was distributed to subscribers by email, by Drudge's own website, and by *Hotwired* magazine and AOL, all adding up to a "persistent" course of contact with D.C.); *Heroes, Inc. v. Heroes Foundation*, 958 F. Supp. 1 (D.D.C. 1996) (Defendants' web-page, soliciting contributions and providing toll-free telephone number, and use of allegedly infringing trademark and logo, along with other contacts, resulted in "persistent" contact with the District of Columbia); *Hall v. La Ronde*, 1997 Cal. App. LEXIS 633 (August 7, 1997) (Court of Appeals held use of electronic mail and telephone to enter into contract with California resident and continuing relationship contemplated by such contract were sufficient to establish minimum contacts with California to support personal jurisdiction over New York defendant); *Hasbro Inc. v. Clue Computing Inc.*, 1997 U.S. Dist. LEXIS 18857 (D. Mass. Sept. 30, 1997) (Rhode Island website operator listed Massachusetts client on its site and which was accessible to Massachusetts residents); *CompuServe, Inc. v. Patterson*, 89 F.3d 1257 (6th Cir. 1996) (repeated transmission of software and messages over the Internet to forum state); *Inset Systems, Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161 (D. Conn. 1996); *Heroes, Inc. v. Heroes Foundation*, 41 U.S.P.Q.2d 1513 (D.D.C. 1996); *Maritz, Inc. v. CyberGold, Inc.*, 947 F. Supp. 1328 (E.D. Mo. 1996) (191 hits by Missouri viewers on California website constituted "purposeful availment"); *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997) (3,000 Pennsylvania subscribers to Internet news service constituted "purposeful availment"); *Panavision Intern, L.P. v. Toeppen*, 938 F. Supp. 616 (C.D. Cal. 1996), *aff'd*, 144 F.3d 1316 (9th Cir. 1998); *EDIAS Software Intern, L.L.C. v. Basis Intern, Ltd.*, 947 F. Supp 413 (D. Ariz. 1996) (defendant could foresee impact in the forum state of defamatory material on its website and e-mail sent into state); *Minnesota v. Granite Gate Resorts, Inc.*, 1996 W.L. 767432 (E. Minn. 1996) (contract provision that website operator could sue user of operator's services in user's home state); *Resuscitation*

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The primary difficulty in applying *Zippo* to the cyberspace world is that the question as to whether specific jurisdiction will be found and a site put in the "interactive" or "passive" category may sometimes turn more on a court's perception than on real differences in the manner in which the user employs the Internet. Subjectivity even plays a role where the *Zippo* method of analysis is employed. For example, a judge in the Southern District of New York in 2000 acknowledged that plaintiffs' allegations that defendants' mobile telephone and two-way e-mail services were used in New York were "factually unsupported." Nevertheless, the court found that the mere availability of the defendant's website in New York made it "intuitively apparent" that defendant's services were used by New York residents, thereby establishing a basis for jurisdiction.[129]

In contrast to the foregoing liberal application of *Zippo*, a Texas federal court used a stricter analysis in a case where the Texas-based plaintiff registered the trademark "People Solutions."[130] The defendant, a California-based human resources company bearing the same name as the plaintiff's, developed a website using the name "peoplesolutions." Defendant's site contained various interactive pages allowing customers to take and score performance tests, download product demonstrations, order products online and register for brochures, test demonstration diskettes, and answer test questions. The defendant did not sell any products exclusively through its website nor did it sell any products or services to anyone in Texas through its website or as a result of any Texan's interaction with this website, although it had one Texas client.

Plaintiff sued in Texas for trademark infringement, unfair competition and injury to business reputation. Plaintiff argued that specific jurisdiction over the defendant existed because the defendant used the name "peoplesolutions" on its website. However, applying the *Zippo* analysis, the court held that the defendant's "interactive" website did not rise to a level of interactivity sufficient for Texas jurisdiction.[131] Although its website had the "potential to interact with, sell products to, and contract with Texas residents," the level of Texas-based commercial activity actually achieved by the defendant on its website was inadequate to establish personal jurisdiction.[132] As the court observed that "[p]ersonal jurisdiction should not

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*Technologies, Inc. v. Continental Health Care Corp.*, 1997 W.L. 148567 (S.D. Ind. 1997) (although plaintiff initiated contacts with its website posting, subsequent extensive e-mail and phone contacts by Michigan defendants warranted Indiana jurisdiction); *California Software Inc. v. Reliability Research*, 631 F. Supp. 1356 (C.D. Cal. 1996) (messages placed by Vermont residents on web bulletin board defaming California business foreseeably caused damage in California).

[129] *Cable News Network, L.P. v. GoSMS.com, Inc.*, 2000 WL 1678039 (S.D.N.Y.).

[130] *People Solutions, Inc. v. People Solutions, Inc.*, 2000 U.S. Dist. LEXIS 10444 (N.D. Tex.).

[131] *Id.* at *13.

[132] *Id.* at *12.

be premised on the mere possibility, with nothing more, that Defendant may be able to do business with Texans over its website; rather, Plaintiff must show that Defendant has 'purposely availed itself' of the benefits of the forum state and its laws."[133] Even though defendant had one Texas client whom it invoiced in Texas, this did not alter the result, particularly where defendant communicated with that client through offices outside Texas.[134]

It is instructive to compare the result in the foregoing case to another decision from the same federal court in the same year, involving a Texas plaintiff based in Dallas that registered the trademark "Peeper's" in connection with its retail optical business.[135] The defendant was a Minnesota-based retail optical firm that registered the domain names "peepers.com" and "peepers2000.com" to sell its products online. Defendant did not sell its optical products under the "Peeper's" name, but sold them under the marks of their third-party manufacturers. Nonetheless, plaintiff sued for unfair competition and trademark infringement as a result of defendant's use of the "peepers.com" domain name.

Defendant had no officers, sales agents, or other representative in Texas, and neither owned nor leased any real or personal property there. It did not maintain any bank accounts or phone listings in Texas, nor did it market products or advertise directly in Texas. It was neither licensed to do business in, nor paid taxes in Texas, and its retail stores made no sales to Texas-based customers. The defendant's only nexus to Texas was through its website, for which the host computers were located in New York. Defendant's site enabled customers to browse through catalogues and complete order forms for eyewear products they chose to purchase, and upon completing their orders, defendant would send them e-mail messages confirming the transactions. Although defendant regularly sold products to Texas customers through its website, and a six-week period in late 1999, e-commerce sales to Texans "occurred almost daily and typically involved multiple transaction each day," although those sales constituted fewer than one-half of one percent of defendant's total sales.[136]

Applying a *Zippo* analysis, the court found that defendant's website was interactive, since customers could both use the site to submit orders and receive "personal service," because the site's e-mail capability enabled them to communicate directly with defendant's customer service department.[137] The key to jurisdiction here was that defendant shipped products ordered by Texas residents to their Texas homes and furnished them with user names and passwords to

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[133] *Id.* at *11.

[134] *Id.* at *12.

[135] *American Eyewear, Inc. v. Peeper's Sunglasses and Accessories, Inc.*, 106 F. Supp. 2d 895 (N.D. Tex. 2000).

[136] *Id.* at 898.

[137] *Id.* at 901.

facilitate future orders. An executive of defendant also acknowledged that his company "attempts to reach every person, including all Texans, who have Internet access and to provide them with the opportunity to purchase defendant's products from anywhere, at any time."[138] The court found personal jurisdiction over defendant, deeming irrelevant that defendant did not sell any products using the trademarked "Peeper's" name, or that its host computers were not located in Texas, or that its sales to Texas resident constituted fewer than one-half of one percent of its total sales.[139] The court pointed to steps that it felt defendant could have taken to avoid Texas jurisdiction: designing its website to block order from or deliveries to Texas residents, or incorporating a "clickwrap agreement" into its website that contained a choice of jurisdiction.[140]

2. The "Effects" Test in Cyberspace.

If the website operator *intends* to cause an effect in a given forum and actually does, he arguably avails himself of the privilege of doing business there in the same manner as occurred in *Calder*. In the first federal case applying the "effects" test to find jurisdiction in cyberspace, a resident of Illinois allegedly operated a "cybersquatting" scheme to register exclusive Internet domain names for his own use that contained registered trademarks belonging to others.[141] Defendant allegedly demanded fees from Panavision, a well-known California resident, and other businesses as the price for relinquishing his rights to domain names that corresponded to existing trademark registrations.

The Ninth Circuit affirmed the trial court's finding of specific personal jurisdiction in California, because the cybersquatter was viewed as having committed a tort which "is aimed at or has an effect in the forum state."[142] The Ninth Circuit recognized that the mere act of registering another's trademark as a domain name and posting an infringing site on the Internet does not, without more, subject a non-resident to personal jurisdiction in a forum state.[143] However, the "something more" consisted here of defendant's efforts to "extort" money from plaintiff, hence defendant's conduct in Illinois was designed to, and in fact did, cause injury to the plaintiff in California.[144]

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[138] *Id.*

[139] *Id.* at 902-03.

[140] *Id.* at 903.

[141] *Panavision Int'l, L.P. v. Toeppen*, 144 F.3d 1316 (9th Cir. 1998).

[142] 141 F.3d 1316 at 1321.

[143] *See id.* at 1322.

[144] *Id.*

When the facts may be insufficient under the *Zippo* doctrine alone, *i.e.*, where there is little more than accessibility of defendant's website, some courts will invoke the "effects" test to tilt the scale in favor of jurisdiction. For example, in a trademark suit in which the federal court in Michigan found defendant's site "highly" interactive, it also found that defendant may have targeted Michigan residents by selling merchandise online that contained logos of Michigan sports teams.[145] Defendant conducted its business primarily through the Internet, not through traditional retail outlets. Its website enabled users to order merchandise online through its "virtual store," where they could search for specific products, browse through catalogs, place items in virtual shopping carts, view product descriptions, prices, and pictures, view items previously placed in their shopping carts, purchase products at the "checkout counter" by providing credit card and shipping information, and track the status of order. After placing an order, they would receive e-mail confirmations from Justballs.[146] In actuality, the court could just as easily have based jurisdiction on a finding that the website "integral" to defendant's commercial operations.

### 3. Jurisdictional Issues in the Context of Securities Laws.

#### (a) Interpretations by the U.S. Securities and Exchange Commission ("SEC").

It will be recalled that, under international law, a country may assert jurisdiction over a non-resident where the assertion of jurisdiction would be reasonable. The standards include, among others, whether the non-resident carried on activity in the country only in respect of such activity, or whether the non-resident carried on, outside the country, an activity having a substantial, direct, and foreseeable effect within the country with respect to such activity. Under these rules, a court in one country could assert jurisdiction over a foreign company under the "doing business" or "substantial and foreseeable effects" tests where financial information is directed by e-mail into the country. The accessibility of a Website to residents of a particular country might also be considered sufficient to assert personal jurisdiction over an individual or company running the website.

In 1998 the SEC issued an interpretive release on the application of federal securities laws of the U.S. to offshore Internet offers, securities transactions and advertising of investment services.[147] The SEC's release sought to "clarify when the posting of offering or solicitation materials" on Websites would not be deemed activity taking place in the United States for

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[145] *Sports Authority Michigan, Inc. v. Justballs, Inc.*, 97 F. Supp. 2d 806 (E.D. Mich. 2000).

[146] 97 F. Supp. 2d at 814.

[147] SEC Release No. 33-7516 (Mar. 23, 1998) ("Release 33-7516").

purposes of federal securities laws.[148] The SEC adopted a rationale that resembles one adopted earlier by the North American Securities Administrators Association ("NASAA") in determining the application of state blue-sky laws.[149] Essentially, the SEC stated that it will not view issuers, broker-dealers, exchanges and investment advisers to be subject to registration requirements of the U.S. securities laws if they are not "targeted to the United States.[150]

Thus, the SEC generally will not consider an offshore Internet offer made by a non-U.S. offeror as targeted at the U.S. if (1) the Website includes a prominent disclaimer making clear that the offer is directed only to countries *other* than the U.S., and (2) the Website offeror implements procedures that are "reasonably designed to guard against sales to U.S. persons in the offshore offering."[151] There are several ways that an offer to non-U.S. locales can be expressed. The site could state specifically that the securities are not available to U.S. persons or in the U.S. Alternatively, it could list the countries in which the securities are being offered.

There are likewise several ways to guard against sales to U.S. persons. For example, the offeror could determine the buyer's residence by obtaining the purchaser's mailing address or telephone number (including area code) before sale. If the offshore party received indications that the purchaser is a U.S. resident, such as U.S. taxpayer identification number or payment drawn on a U.S. bank, then the party might on notice that additional steps need to be taken to verify that a U.S. resident is not involved.[152] Offshore offerors who use third-party Web services to post offering materials would be subject to similar precautions, and also would be have to install additional precautions if the third-party Website generated interest in the offering. The offshore offeror which uses a third-party site that had a significant number of U.S. subscribers or clients would be required to limit access to the materials to those who could demonstrate that they are not U.S. residents.[153]

Where the off-shore offering is made by a U.S. issuer, stricter measures would be required because U.S. residents can more readily obtain access to the offer. Accordingly, the SEC requires a U.S. issuer to implement password procedures by which access to the Internet offer is limited to persons who can obtain a password to the Website by demonstrating that they

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[148]*Id*., Part I. The release applied only to posting on websites, not to targeted kinds of communication such as e-mail.

[149]*See* subpart IV.B.3.(b), *infra*, for NASAA approach.

[150]Release 33-7516, Part I.

[151]*Id.*

[152]*Id.,* Part III.B.

[153]*Id.,* Part III.D.

are not U.S. citizens.[154] If Internet offerings are made by a foreign investment company, similar precautions must be taken not to target U.S. persons in order to avoid registration and regulations under the 1940 Act. From a practical standpoint, the SEC's historical reluctance to allow foreign investment companies to register under the 1940 Act means that foreign investment companies can only make private placement in the U.S.[155] When an offer is made offshore on the Internet and with a concurrent private offer in the U.S., the offeror must guard against indirectly using the Internet offer to stimulate participants in the private U.S. offer.[156]

The SEC's interpretation requires a broker-dealer which wants to avoid U.S. jurisdiction to take measures reasonably designed to ensure that it does not effect securities transactions with U.S. persons as a result of Internet activity. For example, the use of disclaimers coupled with actual refusal to deal with any person whom the broker-dealer has reason to believe is a U.S. person will afford an exemption from U.S. broker-dealer registration as suggested in the SEC interpretation, a foreign broker-dealer should require potential customers to provide sufficient information on residency.

By like token, the SEC will not apply exchange registration requirements to a foreign exchange that sponsors its own Website generally advertising its quotes or allowing orders to be directed through its Website so long as it takes steps reasonably designed to prevent U.S. persons from directing orders through the site to the exchange. Regardless of what precautions are taken by the issuer, the SEC will view solicitations as being subject to federal securities laws if their content appears to be targeted at U.S. persons. For instance, the SEC cited offshore offers that emphasize the investor's ability to avoid U.S. taxes on the investment.[157]

(b) U.S. Blue–Sky Administrators.

The Internet from the onset posed an issue whether offerings posted on a Website without more might be subject to the blue-sky law of every state in the U.S. from which they were accessible. Certainly, whether an Internet offer "originates" from a given state should not be based on the physical location of the essentially passive circuits carrying the message. Regardless of the multiplicity of networks and computers that an electronic message may traverse, the place where information is entered into a Website or into e-mail is the point of origination. Whether an Internet-based offer to buy or sell is "directed" into a given state is a more complex factual inquiry. If an offer to sell securities were mailed or communicated by

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[154] *Id.*, Part IV.B.

[155] *Id.*, Part V.

[156] *Id.*, Parts IV.A., V.A.

[157] *Id.*, Part III.B.

telephone to a person in a forum state, personal jurisdiction in that state should apply.[158] By like token, an e-mail offer by Internet directly to the a resident of a state would similarly constitute a basis for jurisdiction in that state. So would acceptance by an out-of-state issuer of an e-mail from person in the forum state, subscribing to a general offering posted on the World Wide Web.

NASAA recognized early on that mere posting of the existence of an offering on the World Wide Web, without more, is different. Standing alone, it constitutes insufficient evidence that the offer is specifically "directed" to persons in every state. NASAA became the first super-regulatory entity to adopt a jurisdictional policy that would facilitate electronic commerce in securities. Under its model rule, states will generally not attempt to assert jurisdiction over an offering if the website contains a disclaimer essentially stating that no offers or sales are being made to any resident of that state, the site excludes such residents from access to the purchasing screens and in fact no sales are made to residents of that state.[159]

By May 2001, 40 states had adopted a version of the NASAA safe-harbor, either by statute, regulation, interpretation or no-action letter.[160] Commonly, the disclaimer is contained in a page linked to the home page of the offering. A preferred technique is to request entry of the viewer's address and ZIP code before the viewer is allowed to access the offering materials. If the viewer resides in a state in which the offering has not been qualified, access is denied. Of course, the viewer might choose to lie, but it can be argued with some logic that a website operator cannot reasonably "foresee" that viewers would lie.

NASAA also adopted in 1997 a practical approach to jurisdiction over Internet-based broker-dealers and investment advisors.[161] NASAA's policy exempts from the definition of "transacting business" within a state for purposes of Sections 201(a) and 201(c) of the Uniform Securities Act those communications by out-of-state broker-dealers, investment advisers, agents and representatives that involve generalized information about products and services where it is clearly stated that the person may only transact business in the state if first registered or otherwise exempted, where the person does not attempt to effect transactions in securities or render personalized investment advice, uses "firewalls" against directed communications, and

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[158] 1 J. LONG, BLUE SKY LAW (1997 rev.), §3.04[2] at 3-26, 3-27.

[159] Model NASAA Interpretive Order and Resolution, posted at NASAA's official Website, <www.nasaa.org/bluesky/guidelines/internetadv.html>.

[160] *See* BLUE SKY L. REP. (CCH) ¶6481.

[161] The policy is available on the Internet at <www.nasaa.org/bluesky/ guidelines/internetadv.html>. *See also* Interpretive Order Concerning Broker-Dealers, Investment Advisers, Broker-Dealer Agents and Investment Adviser Representatives Using the Internet for General Dissemination of Information on Products and Services (Apr. 27, 1997) CCH NASAA Reports ¶2191.

also uses specified legends.[162] NASAA's approach should facilitate the use of the Web by those smaller or regional securities professionals who focus their activities in a limited geographical area.

C. General Jurisdiction on the Internet.

Given its strict requirements, it is not surprising that to date there has been no reported finding by a U.S. court of general jurisdiction based solely on advertising on the

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[162] 31 states had adopted a version of the NASAA policy as of May, 2001. 1 BLUE SKY L. REP. (CCH) ¶6481. Broker-dealers, investment advisers, broker-dealer agents ("BD agents") and investment adviser representatives or associated person ("IA reps") who use the Internet to distribute information on available products and services directed generally to anyone having access to the Internet, and transmitted through the Internet, will not be deemed to be "transacting business" in the state if all of the following conditions are met:

A. The communication contains a legend clearly stating that:

(1) the broker-dealer, investment adviser, BD agent or IA rep may only transact business in a particular state if first registered, excluded or exempted from state broker-dealer, investment adviser, BD agent or IA rep requirements, as the case may be; and

(2) follow-up, individualized responses to persons in a particular state by such broker-dealer, investment adviser, BD agent or IA rep that involve either the effecting or attempting to effect transactions in securities or the rendering of personalized investment advice for compensation, as the case may be, will not be made absent compliance with the state's broker-dealer, investment adviser, BD agent or IA rep requirements, or pursuant to an applicable state exemption or exclusion; and

a. for information concerning the licensure status or disciplinary history of a broker-dealer, investment adviser, BD agent or IA rep, a consumer should contact his or her state securities law administrator.

B. The Internet communication contains a mechanism, including without limitation technical "firewalls" or other implemented policies and procedures, designed to ensure that prior to any subsequent, direct communication with prospective customers or clients in the state, the broker-dealer, investment adviser, BD agent or IA rep is first registered in the state or qualifies for an exemption or exclusion from such requirement. (This provision is not to be construed to relieve a broker-dealer, investment adviser, BD agent or IA rep who is registered in a state from any applicable registration requirement with respect to the offer or sale of securities in such state);

C. The Internet communications shall not involve either effecting or attempting to effect transactions in securities, or the rendering of personalized investment advice for compensation, as the case may be, in such state over the Internet, but shall be limited to the dissemination of general information on products and services.

D. Prominent disclosure of a BD agent's or IA rep's affiliation with a broker-dealer or investment adviser is made and appropriate internal controls over content and dissemination are retained by the responsible persons.

Internet.[163] At the same time, some courts have used only little additional activity as a crutch to support a general jurisdiction finding based primarily upon website activity. One Texas case found general jurisdiction over the manufacturer of a bunk bed in a wrongful death action involving a three year old child where the manufacturer's website allowed customers to shop online, check status of purchases and contact sales representatives, and where the manufacturer had 3.2% of its sales in Texas.[164] This volume might have been insufficient for general jurisdiction in some other courts. For example, the Eastern District of Virginia has rejected general jurisdiction, even though sales in the state by defendants were close to $4 million in the prior three years, and defendant had a website that was interactive.[165] In 2000, the Northern District of Illinois found general jurisdiction where the website owner had a representative in Illinois and its website included its catalog and an online catalog order form.[166] In its general jurisdiction analysis, the court relied on *Zippo*, surely an anomaly in light of the fact that *Zippo* speaks to specific, rather than general, jurisdiction.

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[163]*See, e.g., Dagesse v. Plant Hotel, N.V.*, 113 F. Supp. 2d 211, 222 (D.N.H. 2000) (advertising and accepting hotel reservations for its Aruba hotel on its interactive website insufficient to subject defendant to general jurisdiction in New Hampshire)*; Holiday v. 3Com Corporation*, 2000 WL 1796535 (D. Wyo.) (defendant's website touted 3Com's work with the Wyoming Department of Education, listed retailers and service providers in Wyoming and had purchase options for viewers; this was not 'continuous and systematic contact."); *Grutowski v. Steamboat Lake Guides & Outfitters, Inc.* 1998 WL 9602 (E.D. Pa.), ___ F. Supp. 2d _____; *McDonough v. Fallon McElligott, Inc.*, 40 U.S.P.Q.2d 1826 (S.D. Cal. 1996); *IDS Life Insurance Co. v. Sun America, Inc.*, 1997 W.L. 7286 (N.D. Ill. 1997). These cases reject general jurisdiction over a defendant based on Web advertising, where the matters complained of had nothing to do with the Web presence or the advertising. In *California Software, Inc. v. Reliability Research, Inc.*, 631 F. Supp. 1356 (C.D. Cal. 1986), defendants wrote messages to several California companies via a bulletin board and communicated with three California residents via telephone and letters, allegedly denigrating plaintiffs' right to market software. The Court held that general jurisdiction could not be based on the "mere act of transmitting information through the use of interstate communication facilities," where defendant had no offices in California and did not otherwise conduct business there except to communicate with California users of the national bulletin board; 631 F. Supp. at 1360 (The court did find specific jurisdiction). In *Panavision International, L.P. v. Toeppen*, 938 F. Supp. 616 (C.D. Cal. 1996), the federal court rejected general jurisdiction in California over an Illinois defendant who used a California company's trademark in a website address in order to compel the plaintiff to buy out his domain rights.

[164]*Mieczkowski v. Masco Corp.*, 997 F. Supp. 782 (E.D. Tex. 1998).

[165]*Chiaphua Components Limited v. West Bend Company*, 95 F. Supp. 2d 505, 512 (E.D. Va., Norfolk Div., 2000). *See also Purchased Parts*, note [97], *supra.*

[166]*Publications International, Ltd. v. Burke/Triolo, Inc.*, 121 F. Supp. 2d 1178, 1182-83 (N.D. Ill., E. Div. 2000). Note that the court also found specific jurisdiction over defendant based on defendant's distribution of its CD-ROM catalogs in Illinois. *Id.* at 1181. Accordingly, the finding of general jurisdiction was not only dubious in its analysis but unnecessary.

D. In Rem Jurisdiction Over Internet "Property."

As noted earlier, in rem jurisdiction requires that fundamental fairness be satisfied.[167] In 1999, a Virginia federal district court declined to exercise in rem jurisdiction over 128 registered Internet domain names, citing Supreme Court dicta for the proposition that "courts generally cannot exercise in rem jurisdiction to adjudicate the status of property unless the due process clause would have permitted in personam jurisdiction over those who have an interest in the res."[168] Thereafter, in passing the Anticybersquatting Consumers Protections Act ("ACPA") in 1999, Congress specifically made in rem proceedings available in cases involving cybersquatting, if the owners of alleged infringing websites could not be found within the plaintiff's jurisdiction.[169] This led the Fourth Circuit in June, 2000 to vacate the Virginia district court's order in order that the result could be revisited in the context of ACPA.[170] The Virginia court subsequently held that the in rem provisions of the ACPA were constitutional, ruling that the U.S. Supreme Court's analysis only required sufficient minimum contacts in those in rem actions where the underlying cause of action is unrelated to the property located in the forum.[171] However, if in personam jurisdiction over a defendant is available in the forum, an in rem action under ACPA will not be available.[172]

In *Heathmount A.E. Corp. v. Technodome.com*, the federal court for the Eastern District of Virginia considered the application of the U.S. Anticybersquatting act to two Canadian litigants fighting over two domains: "Technodome.com" and "destination technodome.com."[173] The plaintiff brought an action under the in rem jurisdiction provisions in the ACPA. The owner of the domain argued that the case should have been heard in the Canadian courts, citing as support forum non conveniens and international comity.

The court ruled against the motion to dismiss, stating that:

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[167]*Supra*, note 61, and accompanying text.

[168]*Porsche Cars North America, Inc. v. Porsche.com ("Porsche")*, 51 F. Supp. 2d 707, 712 (E.D. Va., Alex. Div. 1999).

[169]15 U.S.C. §1125.

[170]*Porsche Cars North America Inc. v. allporsche.com*, 215 F.3d 1320 (decision not published), 55 U.S.P.Q.2d 1158 (4th Cir. 2000).

[171]*Caesars World, Inc. v. Caesars-palace.com*, 200 U.S. Dist. LEXIS 2671 (E.D. Va., March 3, 2000).

[172]*Lucent Technologies, Inc. v. Lucentsucks.com*, 95 F. Supp. 528 (E.D. Va., Alex. Div. 2000); *Alitalie-Linee Aeree Italiane S.p.A. v. Casinoalitalia.com*., (E.D. Va. Jan. 19, 2001) (interactive nature of defendant's online gambling website afforded personal jurisdiction).

[173]Case No. CA-00-00714-A (E.D. Va., 2000).

> A Canadian court would be less familiar with the provisions of the ACPA than is this Court. Even if it prevailed, Plaintiff might face difficulties enforcing the Canadian court's judgment in the United States, which would arguably undercut its U.S. trademark rights in its 'technodome' mark. A trademark holder seeking to enforce its U.S. registered marks against infringing domain name registrants should not be penalized in the exercise of those rights merely because the parties involved are not United States citizens. On a more basic level, Plaintiff may not be able to assert the same rights in Canada, which lacks a body of law equivalent to the ACPA and whose enforcement of its trademark laws cannot extend into the United States.

Professor Michael Geist of the University of Ottawa Faculty of Law found the decision troubling, since in his view, "it effectively exports the ACPA to the world given that no other county will provide the same rights as does the U.S. statute (unless they adopt an ACPA)."[174]

## V. Contractual Choice of Law and Forum on the Internet.

### A. General Considerations.

In evaluating jurisdiction over an e-commerce dispute, it is important to determine at the onset whether there is any pre-dispute agreement on choice of forum. Quite often there may be an agreement to have disputes settled by arbitration in a certain location, or an agreement that any litigation must be brought in courts of a certain state. As discussed earlier, if parties to the contract are presumed to have equal bargaining power and, therefore, an equal ability to accept or reject such clauses, the clauses are generally uncontroversial and enforced. However, equality between buyer and seller has not always been presumed when one party to the contract is a consumer. Instead, the seller is assumed to define its market and set the terms of the contract for its own benefit. While the buyer is assumed to be confronted with either (a) accepting terms imposed by one of a limited number of sellers serving the buyer's market or (b) foregoing the purchase altogether. The U.S. Supreme Court in the *Carnival Cruise Lines* case upheld the pre-dispute contractual choice of forum as against a consumer.[175] However, it should be remembered that the Supreme Court stated that "fundamental fairness" was required in such

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[174] *The Legal Implications of the Yahoo! Inc. Nazi Memorabilia Dispute: An Interview With Professor Michael Geist*, JURISCOM.NET posted online at <www.juriscom.net/en/uni/doc/yahoo/geist.htm>. He also analogized the result to *Yahoo*, asserting that "the decision illustrates that courts worldwide are reluctant to surrender jurisdiction, particularly if doing so means that the local law will either be applied by a foreign court or not at all." *Id.*

[175] *See* discussion of *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991) at subpart II.B.2, *supra*.

situations.[176] Moreover, in the case before the Court there was no question of the passengers having prior notice of the contractual choice of forum.

Many disputes involving electronic commerce arise between parties who are bound by a contract determining the terms and conditions upon which they have agreed to interact. Frequently, an online contract itself may provide choice of forum clause as well as a choice of law.[177]

### B. The U.S. Approach to Pre-Dispute Choice of Jurisdiction and Law in E-commerce.

#### 1. Click-Wraps, Shrink-Wraps And Browse-Wraps.

A "click-wrap" agreement is one which a provider of goods or services presents online to the purchaser, who can agree to the terms and conditions of the agreement by either clicking a designated icon or button or typing specified words or phrases. Such click-wrap agreements are the cyberspace progeny of "shrink-wrap licenses," which were introduced in connection with the sale of CD-ROM disks which had a software license agreement encoded on the disk and printed in the user manual. The license terms were not on the outside of the box containing the disk, but the box customarily referred to the license. Such shrink-wrap licenses were upheld as valid by the Seventh Circuit in *ProCD, Inc. v. Zeidenberg*,[178] even though the license was not viewed until after the CD-ROM was inserted into the user's computer, because the software could not be used unless and until the user was shown the license terms and manifested his assent.[179] The Seventh Circuit viewed the buyer's use of the software after having had the opportunity to read the license at leisure as a form of acceptance by conduct.[180] The shrink-wrap agreement could thus be enforced unless their terms violate a rule of positive law or are unconscionable.[181] In the on-line environment, a user may view the terms and conditions on the screen, using a control such as a keyboard, or mouse to scroll through or otherwise navigate the terms and then click a button or bar indicating assent. A true click-wrap assent should be distinguished from situations where the terms and conditions are merely posted on the website and agreement to those terms and conditions is implied without the user being

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[176] 499 U.S. at 595.

[177] Contract terms themselves, of course, also supply a set of substantive rules to govern the transaction, which will be used by a court unless they violate the public policy of the forum.

[178] 86 F.3d 1447 (7th Cir. 1996).

[179] 86 F.3d at 1451-52.

[180] *Id.* at 1452.

[181] *Id.* at 1449. But *see Klocek v. Gateway, Inc.*, 104 F. Supp. 2d 1332 (D. Kan. 2000).

required actually to expressly indicate agreement. Such agreements are sometimes called "browse-wrap."[182]

2. Cases Upholding Click-Wraps.

Perhaps the earliest reported U.S. case supporting an online agreement was the Sixth Circuit's decision in *Compuserve, Inc. v. Patterson*.[183] This was more than a standard click-wrap, since the user actually typed "agree" to an online agreement whose choice of jurisdiction was used as one of several contacts to warrant holding the user subject to personal jurisdiction in service provider's home state. Subsequently, a state court upheld a click-wrap choice of forum by an AOL subscriber where the subscriber could only enroll on AOL by clicking the "I agree" button placed next to the "read me" button or the "I agree" button next to the "I disagree" button at the conclusion of the subscription agreement, which contained the forum selection clause.[184]

A Rhode Island state court subsequently sustained a click-wrap forum selection where subscribers to the Microsoft Network had the option of either clicking a box which said "I Agree" or clicking another which said "I Don't Agree" at any time while scrolling the adjacent terms and conditions, which included a forum selection clause, before registering for the service.[185] In the Rhode Island case, the subscriber clicked "I Agree," allowing the court to draw an analogy to the pre-contractual opportunity to read the fine-print terms in *Carnival Cruise Lines*, and the court refused to treat an electronic presentation differently from one on paper.

An Illinois federal court found a click-wrap arbitration agreement binding on the user as against a defense of procedural unconscionability even though the arbitration clause appeared in the final paragraph of the agreement under the caption "Miscellaneous," which included provisions on choice of law and forum.[186] The court noted that the clause was in same font as the rest of the agreement, was freely scrollable and viewable without time restrictions, and a viewer had to agree to the online license agreement before being able to install software from the provider's website. The same federal judge had earlier enforced the same click-wrap

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[182]*Pollstar v. Gigmania Ltd.*, 2000 WL 33266437 (E.D. Cal.).

[183]89 F.3d 1257 (6th Cir. 1996).

[184]*Groff v. America Online, Inc.*, 1998 WL 307001 (R.I. Super. May 27, 1998).

[185]*Caspi v. Microsoft Network, L.L.C.*, 732 A.2d 528 (N.J. App. Div. 1999).

[186]*In re RealNetworks, Inc., Privacy Litigation* ["*RealNetworks*"], 2000 WL 631341 (N.D. Ill.). The court also ruled that the click-wrap agreement was a "written" agreement as required by the Federal Arbitration Act, although the federal "E-Sign Act" had not yet been enacted. 2000 WL 631341 *3.

agreement in the same action.[187] A number of other cases have upheld a click-wrap choice of forum.[188]

### 3. Cases Questioning Click-Wraps Or Browse-Wraps.

More recently, some courts have begun to find grounds on which to decline to enforce consumer click-wraps. Thus, a California Court of Appeal this year invoked a public policy exception to consumer choice of law.[189] The trial court had found the forum selection clause in a click-wrap agreement made during installation process on CD-ROM unfair and unreasonable, because the clause (a) was not negotiated at arm's length, (b) was in a standard "form" contract, (c) was in small text and placed at the end of the agreement, hence not readily identifiable by plaintiff and (d) was contrary to California public policy which affords its citizens specific and meaningful consumer remedies. The prime difference between the Virginia consumer protection law and that of California was that the California statute allows a consumer to bring a class action, Virginia's does not. The trial court therefore found a Virginia forum selection clause invalid.

The appellate court focused on the public policy issue rather than on the issue of assent. It shifted the usual burden of proof in jurisdiction cases from the defendant to the party seeking to uphold a forum selection clause contrary to California's Consumers Legal Remedies Act (CLRA). It emphasized the anti-waiver provision in the CLRA and ten compared the consumer protection provisions in Virginia's statutes. It held that the provision in California's statute for class actions, not found in the Virginia statute, made the California protections substantially greater and therefore unwaivable as a matter of public policy.

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[187] *Lieschke v. RealNetworks, Inc.*, 2000 WL 198424 (N.D. Ill.) (arbitration clause on Real Networks site contained in a click-wrap license which users were required to traverse before they could download software to play and record music).

[188] *America Online, Inc. v. Booker* ("Booker"), 781 So. 2d 423 (Fla. 2001 Ct. App.) (forum selection provision in an online ISP subscription, "freely negotiated" and not shown "unreasonable or unjust"; decision unclear on whether agreement to the forum was express via a click-through or simply implied in some way); *Celmins v. America Online. Inc.*, 748 So. 2d 1041 (Fla. Ct. App. 1999) (electronic agreement with Internet service provider enforced forum selection clause; no indication whether there was click-through or implied assent); *Rudder v. Microsoft Corp.*, 1999 Carswell Ont. 3195 (WL) (Ontario Super. Ct. Justice Oct. 8, 1999) (Canadian court expressly upheld the validity of a forum selection clause in click-through contract where subscription procedure required the user to accept the agreement terms each time they appeared on the monitor, and entire agreement could be viewed by scrolling down screen, with terms not analogous to fine print). *Hotmail Corp. v. Van$ Money Pie, Inc.*, 1998 WL388389 (N.D. Cal.) the court applied online terms of service to an action involving alleged tradename and service mark infringement, etc., without discussing the requirements for a valid contract.

[189] *America Online, Inc. v. Superior Court*, 90 Cal. App. 4th 1 (2001).

A California federal district court declined to enforce a click-wrap contained in an online agreement where the terms and conditions were not distinctly shown.[190] The home page of Ticketmaster's website contained instructions, a directory to subsequent event pages (each with separate electronic address and a hypertext link), and, upon scrolling to the bottom, the terms and conditions, including prohibitions against deep linking and against copying for commercial use, as well as a term saying that anyone going beyond the home page thereby agreed to the terms and conditions. There was no "I agree" button or other signification of assent by the website user, who could go directly to the linked page without seeing the terms and conditions). Later, the court reaffirmed its ruling.[191] Addressing arguments of copyright and trespass to chattel, the court briefly reiterated that the contract claim lacked "sufficient proof of agreement by defendant." The judgment was affirmed.[192]

A Massachusetts case declined to enforce a click-wrap in a class action lawsuit concerning installation of software which damaged the user's system before the user could review and assent to the agreement.[193] America Online ("AOL") had set the default for reviewing the agreement to "I Agree"; but the alleged damage wold already have been caused at the start of the installation. The actual agreement terms were accessible only by twice overriding the default choice of "I Agree" and clicking "Read Now" twice. IF the user then rejected the agreement, his computer system would already have been harmed. Since the harm arose from precontract conduct, the forum selection clause would not be enforced. The court here also invoked public policy, citing the impropriety of requiring residents of Massachusetts with small claims to litigate in Virginia).

In July 2001, a New York federal court applied California law to hold unenforceable what was essentially a browse-wrap agreement in *Specht v. Netscape Communications Corp.*[194] Netscape offered "SmartDownload" software free on its website to any website visitor that would click onto a button labeled "Download." The only reference on the page to the license agreement was in text visible only if the visitor scrolls down through the page to the next screen. The visitor would then see an invitation to review the license, but was required neither to view it nor affirmatively to indicate assent before proceeding to download.[195]

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[190] *Ticketmaster Corp. v. Tickets.com Inc.*, 54 U.S.P.Q. 1344, 2000 U.S. Dist. LEXIS 4553, 2000 WL 525390 (C.D. Cal.).

[191] 2000 WL 1887522 (C.D. Cal. Aug. 10, 2000).

[192] 2001 WL 51509 (9th Cir.) (unpublished).

[193] *William v. American Online, Inc.*, 2001 WL 135825 (Mass. Super. Ct. Feb. 8, 2001).

[194] 150 F. Supp. 2d 585 (S.D.N.Y. 2001).

[195] 150 F. Supp. 2d at 588.

Plaintiffs were website visitors who brought a putative class action, claiming their use of the free software caused them to violate privacy and computer fraud statutes. Distinguishing the factual situation from shrink-wraps and click-wraps, the Southern District of New York found "Netscape's failure to require users . . . to indicate assent to its license as a precondition to downloading and using its software . . . [to be] fatal to its argument that a contract had been formed."[196] Accordingly, defendants were unable to compel arbitration pursuant to the online browse-wrap license.

The result in *Specht* is difficult to square with a prior decision by another judge of the same federal court. In *Register.com v. Verio, Inc.*[197], plaintiff had posted license terms on its website alongside a statement that "[b]y submitting this query [to plaintiff's database], you agree to abide by these terms.[198] The court found the foregoing sentence removed any question that by proceeding to submit a query, defendant "manifested its assent to be bound" by the Plaintiff's terms of use.[199]

### 4. Practices by Which U.S. Online Providers May Properly Obtain Assent to Online Terms.

In those jurisdictions which will honor click-wrap choice of law and forum when fairness requirements are met, practitioners should advise their clients to create the best factual basis to support validity of the agreement. There are several important factors to consider. First, there should be a reasonable opportunity for the user to access the terms and conditions and review them before being bound. Second, the terms and conditions should be sufficiently conspicuous and readable. Third, there should be clear and unambiguous manifestation of assent to the terms and conditions. Last, a viewer who has not clearly manifested consent should not be able to contract.

To satisfy the first requirement, proposed terms that involve any choice of law or forum should be presented to the user *before* the user has any opportunity to take an action to be bound by the agreement's terms. All the terms should either appear automatically or the user should be required to click on a clear icon or hyperlink that accesses the terms. The user should then be afforded user sufficient opportunity to review the agreement terms, with the ability to read the terms at his or her own pace and to navigate back and forth within the terms by scrolling

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[196] *Id.* at 595.

[197] 126 F. Supp. 2d 238 (S.D.N.Y. 2000).

[198] *Id.* at 248.

[199] The *Specht* decision noted that the judge in *Register.com* had been applying New York law, whereas "I am applying California law." 150 F. Supp. 2d at 594, n.13.

or changing pages. Once the user views the terms, those terms should remain accessible to the user for further reference.

In the U.S., sufficient conspicuousness includes having the format and content of the terms comply with requirements in applicable laws, such as the Uniform Commercial Code, as to notice, disclosure language, conspicuousness, and the like. The terms should be in plain language and legible. Moreover, the terms and conditions should not be lost in a welter of other information, notwithstanding the *RealNetworks* case.[200] It is equally important that other information on the website should not contradict the agreement terms or render the agreement ambiguous.

The format of the assent must comply with any applicable laws requiring particular assent to a particular type of term, as well as an overall assent to all of the terms. It is desirable that there be an express statement just before the user is able to click his agreement that stresses the effect of agreement. For example, the website might warn the user that: "By clicking 'I agree' below, you acknowledge that you have read, understand, and agree to be bound by the terms above."

In order to assure that the user has the opportunity to see all of the agreement before assenting, it is advisable to place the means of assent at the end of the agreement terms. It is also important to use clear language of assent, *e.g.*, "I agree," "I consent," or "I assent," rather than more ambiguous language, *e.g.*, "Continue," "Submit," or "Enter." Such clear language of assent should be combined with clear choice for the user not only to assent but to reject the terms and to be informed of the consequence of rejection. Ideally, the option to reject will occur at the same point in the process where final assent is requested, and involve an equally clear and unambiguous button or term, such as "I disagree," "I do not agree," "Not agreed," "No," or "I decline."

Finally, a user who rejects the online agreement should not be able to take the transaction any further, without choosing to go back and specifically agreeing to the terms and conditions.

### C. The E.U. Approach to Choice of Law and Jurisdiction in E-commerce.

#### 1. The Brussels Regulation.

To address the advent of E-commerce in the context of the existing Brussels Convention, the E.U. Commission in 2000 had recommended that jurisdiction should generally be based on the defendant's domicile, but that alternative jurisdictional grounds should be

[200] *Supra*, note 186.

available if there were a "close link" between the court and the action or if the "sound administration of justice" would be facilitated.[201] The jurisdiction of the domiciliary country would continue.[202] The place of performance would have jurisdiction over contract actions.[203] In tort actions, jurisdiction would lie in the place "where the harmful event occurred or there is a risk of it occurring.[204]

Subsequently, the E.U. issued the so-called "Brussels Regulation," which took effect March 1, 2002.[205] In contrast to a convention or directive, a "regulation" of the E.U. becomes binding in its adopted form without further implementation by the 15 member countries.[206] The E.U. felt that the need for certainty and uniformity of jurisdictional rules by an early date made it inappropriate to proceed by a mere directive.[207] While the Brussels Regulation does not alter the main structure of the Brussels Convention, it effectuates certain changes that are intended to take account of new technological developments relating to e-commerce. Specifically, the Regulation provides that the courts of the consumer's domicile have jurisdiction over a foreign defendant if the latter "pursues commercial or professional activities in the Member State of the consumer's domicile or, *by any means*, directs such activities to that Member State . . . and the contract falls within the scope of such activities."[208] This language expands the range of situations in which the consumer can sue in his or her place of domicile. Under the Brussels Convention, the consumer can sue in his or her jurisdiction only if the consumer has been subject to a "specific invitation" or advertising made in the consumer's state of domicile. In contrast, the Brussels Regulation abandons the requirement of a specific invitation or advertising and instead covers any consumer contract "concluded with a person who pursues commercial activities in the Member State of the Consumer's domicile . . . *by any means*."

The phrase "by any means" was not inserted as a catch-all. Rather, it is specifically intended to reach Internet-based transactions.[209] Under the Brussels Convention, a consumer

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[201]E.U. Proposal, Preamble, point (11).

[202]*Id.* at Ch. II, §1, art. 2.

[203]*Id*. at Ch. II, §1, art. 5(1).

[204]*Id*. at Ch. II, §1, art. 2(3).

[205]Council Brussels Regulation (EC) (Dec. 22, 2000), OFFICIAL J. L012, 16/01/2001, p.0001-0023.

[206]Marco Berliri, *The EU Approach on Jurisdiction in Cyberspace Under Regulation 44/2001*, paper presented at program of the American Bar Association, Section of International Law and Practice, "LEGAL ISSUES FOR INTERNAT'L BUSINESS ONLINE" (Washington, D.C., May 24, 2001) ["Berliri"], 2.

[207]*Id.*

[208]Art. 15(c) of Brussels Regulation; emphasis added.

[209]*See* European Commission, *Explanatory Memorandum to the Proposal for a Council Regulation on Jurisdiction, COM (1999) 348 of 14 July 1999, online at* <www.europa.eu.int/comm/justice_home/pdf/com1999-

( . . . continued)

must have performed the acts necessary to conclude the contract in the consumer's own country in order to bring suit there. As a result, a consumer who has contracted from a different country, or who cannot prove that he or she contracted from his or her domicile, is not entitled to sue in his or her domicile. The effect of the language used in the Brussels Regulation is to remove this limitation and require simply that the contract fall within the scope of the activities directed to the consumer's domicile. Thus, the Brussels Regulation "equates the offer of goods and services via the Internet with an invitation or advertising by businesses which 'by any means . . . direct their activities towards that Member State . . . .'"[210]

Prior to issuing the Brussels Regulation, the E.U. Commission specifically rejected a proposed amendment that would have defined the concept of activities deemed to be "directed" toward one or more States. In so doing, the E.U. Commission stated that the proposed definition "is based on the essentially American concept of business activity as a general connecting factor determining jurisdiction, whereas the concept is quite foreign to the approach taken by the regulation."[211] The E.U. Commission intended specifically to reject the U.S. jurisdictional rule that only "active websites" constitute doing business in a given jurisdiction.[212] In essence, the Brussels Regulation provides that an unintended effect in a member state can be a basis for jurisdiction.

Both the Brussels Regulation and the Brussels Convention that provide any pre-dispute choice of forum other than the consumer's domicile, if a consumer is dealing with a business, is null and void. The E.U. Commission was expressly unwilling to allow consumer contracts to contain forum selection clauses that referred disputes to courts other than those in the consumer's domicile.[213] The European Commissioner for Health and Consumer Protection purportedly justified this position as necessary to consumer confidence in doing business over

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(continued . . . )
348-en.pdf>. The European Commission pointed out that "the concept of activities . . . directed towards a Member State is designed to make clear that [this provision] applies to consumer contracts concluded via a website accessible in the State of the consumer's domicile."

[210]Berliri, 4, citing *Opinion of the Economic and Social Committee on the Proposal for a Council Regulation (EC) on Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters*, CES 233/2000-99/1054 CNS (March, 2000).

[211]Berliri, 4. European Commission, *Explanatory Memorandum to Amended Proposal for Council Brussels Regulation*, COM (2000) 689, Final October 26, 2000.

[212]Berliri, 4, referencing *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414 (9th Cir. 1997) and *Bensusan Restaurant Corp. v. King*, 937 F. Supp. 295 (S.D.N.Y. 1996), *aff'd*, 126 F.3d 25 (2d Cir. 1997).

[213]Berliri, 5.

the Internet.[214] The effect is that the consumer cannot, even by consent, be deprived of jurisdictional rights provided by the Brussels Regulation.

The Brussels Regulation was controversial and was the subject of fierce lobbying during the legislative process by business and consumer groups.[215] Industry groups claimed it would hinder the growth of e-commerce by making small to medium-sized businesses reluctant to set up websites for fear of being subjected to the jurisdiction of the courts of every other country.[216] The Confederation of British Industry ("CBI") argued that the Brussels Regulation "fails to honour the pledges made by European leaders at Lisbon to promote e-business and, more importantly, does nothing to promote e-business in the E.U. or help consumers in an ever more complex world."[217] According to commentators:

> Whilst previously business had to consciously solicit contracts with consumers in other countries (and therefore the Brussels convention could be seen as right and fair) the Internet has radically altered the way we do business. The Internet, by definition, allows companies to offer their services on a world market without specifically targeting one particular country. Therefore article 15, which says that if a trader by any means, directs such activities to that Member State or to several countries including that Member State, creates an enormous uncertainty for an online trader.[218]

The E.U. Commission has argued that the absence of strong consumer protection principles in e-commerce disputes would not only negatively impact consumer confidence but also affect the unified European market.[219] If consumers who shop online only shop with established enterprises they are familiar with in their own country, it believes that the E.U. e-

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[214] *Id.*

[215] *Id.*, 5-6.

[216] *Id.*, citing Jean Eaglesham, *Web Suits Plan Attacked*, FIN. TIMES, (Nov. 6, 2000).

[217] Nigel Hickerson & Pamela Taylor, *The Brussels Regulation . . . Bad for Business*, 2 E-COMM. LAW & POL. (Issue 2, Dec. 2000), 10.

[218] *Id.* at 11.

[219] *European Commission Explanatory Memorandum to Amended Proposal for Council Brussels Regulation*. COM (2000) 689, Final October 26, 2000.

commerce sector will be put at a significant competitive disadvantage to the U.S., on the theory that the U.S. has stronger consumer protection laws.[220]

2. The Hague Convention.

The Brussels Regulation arguably makes less important the ultimate outcome of the Hague Convention on Jurisdiction. The Hague Conference, which aims to make civil judgments enforceable across borders, has been stalled since 1999 due to a disagreement over how business-consumer disputes should be settled. This treaty would require U.S. companies to defend consumer suits in the country where the consumer resides, even if the company didn't intend to market to that forum, so long as the company advertised on the web and the advertisement could be accessed by the consumer choice of law clauses entered into before a dispute had arisen would be unenforceable. Moreover, unlike the present situation where U.S. courts which are asked to enforce a foreign judgment will examine the jurisdiction of the foreign court using U.S. standards of "minimal contacts," the Hague Convention would require U.S. courts to enforce foreign judgments so long as they simply satisfy criteria of the Hague Convention.

Thus, under the Hague Convention U.S. courts would be required to enforce a foreign judgment against a U.S. resident even if the only contacts with the foreign country were that its site could be accessed there.[221] In addition, the Hague Convention would limit the enforcement of choice of court clauses by consumers so that they may be enforced only when they are agreed upon *after* a dispute has arisen or when they permit the consumer to bring proceedings in another court. The effect of the Convention would be to make a business vulnerable to suit anywhere on the world its site is visible.[222]

The Hague Conference on Private International Law convened in June 2001 for a "Diplomatic Session" to negotiate further the convention on jurisdiction and the recognition of foreign judgments. The next set of negotiations is scheduled for April 22-24, 2002. At the end of the June 2001 session, there was still no broad consensus on a framework for Internet and e-commerce jurisdiction or on consumer contracts. The June 2001 "Interim Text," generated at the Conference, reflects a European Union approach. Thus, "Alternative A" in Article 7 of the Interim Text would allow pre-dispute choice of any forum other than a consumer's residence only if such choice is binding on both parties under the law of the consumer's habitual

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[220]David Byrne, European Commissioner for Health and Consumer Protection, on the occasion of the Annual Conference of the Kangaroo Group of MEP's 18th September 2000 (<http://europa.eu.int/comm/dgs/health_consumer/library/speeches/speech55_en.html>, visited on March 27, 2001).

[221]Testimony of Barbara Wellbery before House Subcommittee on Commerce, Trade and Consumer Protection, May 22, 2001.

[222]*Id.*

residence.[223] Given the effectiveness of the Brussels Regulation on March 1, 2002, Article 7 would in effect make the consumer's residence a non-waivable forum.

D. Choice of Law.

Proponents of the Brussels Regulation had argued following its adoption that it only affected choice of forum, not choice of law, hence would not create a legal swamp: A representative of the U.K.'s Consumer Association contended:

> The new regulation does not mean that an e-business based in the EC is subject to the public laws of all 15 member states. it is unfortunate that some of the critics of the Regulation have argued that business will be paralysed by the legal risks presented by being subject to the trading laws of all of the member states. this is untrue. In fact all advertising, sales promotion etc. "public law" will fall within Article 3 of the draft e-commerce directive which makes it clear that the country of origin principle should apply.[224]

However, the notion that e-commerce sellers and providers need only familiarize themselves with procedural, as distinguished from substantive, laws of 15 different E.U. members was quickly undermined in early February, 2001, when a proposed code called the "Rome II Green Paper" was introduced at the European Commission to govern noncontractual liability in cross-border disputes.[225] In any dispute involving a citizen of one country and a company marketing its goods or services or communicating over the Internet from another, the proposed code would make the law in the consumer's country apply.[226] Such a rule would contradict the E.U. Directive regarding e-commerce issued in 2000, which had provided that the laws of the country of origin should apply.

One commentator said the proposed code in the Green Paper would push Europe "back to tribalism in communications."[227] Nonetheless, by late April 2001 it was reported that officials at the European Commission had shifted tactics on Rome II, and were trying to sidestep

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[223]Hague Conference on Private International Law, June 2001 Interim Text, Art. 7, 7-8.

[224]Ajay Patel, *The Brussels Regulation . . . Good for Business,* 2 E-COMM. LAW & POL. (Issue 2, Dec. 2000), 10, 11.

[225]European Commission, *Communication the Commission to the Council and the European Parliament: E-commerce and Financial Services*, COM (2001) 66 final (Feb. 7, 2001).

[226]Paul Meller, *Concern on Europe E-commerce*, N.Y. TIMES online (Feb. 8 2001), at <http://www.nytimes.com/2001/02/08/technology/08EURO.html>.

[227]*Id.*

opposition by enacting it using a fast-track procedure with almost no public debate.[228] An advisor to the E.C.'s Justice and Home Affairs Commissioner was quoted as saying the draft regulation will be presented to the European Commission for a vote after the August recess but before the end of 2001.[229] Thus, while not only the prior e-commerce directive but many other European regulations say the laws of the country where the supplier or website is situated should govern in a consumer transaction online, Rome II was moving to enact the opposite and give jurisdiction to the consumer's domicile.

Business has argued that Rome II's approach would impose such a nightmare of overlapping and conflicting laws on them that doing international business over the Internet would be impractical for a company without a huge legal staff.[230] In the words of Hans Merkle, Deputy President of the World Federation of Advertisers in Brussels, "[a]dvertisers would be subjected to different and possibly conflicting laws," such that "Pan-European advertising could become a game of Russian roulette."[231] Work on Rome II slowed practically to a halt in the summer of 2001, but it is understood as of March 2002 that a draft Regulation may be published in the summer of 2002.[232]

Matthew S. Yeo and Marco Berliri have offered an analysis and perspective on the problem of determining the governing law in E-commerce transactions. They use the European Union as an example and compare three E.U. approaches to resolve conflicts.[233] The first alternative is to simply permit the merchant to designate any law that has a substantial connection to the transaction. They believe that, because consumers may not know or be able reasonably to determine their rights under such law, resulting apprehension on the part of consumers may retard the growth of E-commerce. The second alternative is to adopt the mandatory rules concept. Similar to the Brussels Convention, the contract can specify the law that will apply to the transaction, but would not trump mandatory consumer protection rules. The authors see this also as generating confusion and increasing the cost of compliance, because the merchant is required to be familiar with the mandatory rules of each jurisdiction.

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[228]Paul Meller, *Europe Tries to Fast-Track Proposed E-commerce Rules*, N.Y. TIMES online (April 27, 2001) at <http://www.nytimes.com/2001/04/27/technology/27EURO.html>.

[229]*Id.*

[230]*Id.*

[231]Louella Miles, *Local Liability: Rome II, Internet 0*, CCFO (April 2001) online at <www.ecfonet.com/articles/al_local_liability0401.html>.

[232]EV Policy and Legislation (March 3, 2002), posted at AANET (www.adassoc.org.uk/aanet/evpolicy.html).

[233]<http://pubs.bna.com/ip/BNA/EIP.NSF/b3e99e4adbdfc8cc85256480004f6e47/f916e63b1616fb7b85256706001efe99?OpenDocument>

The third alternative, which the authors favor, is to harmonize national consumer protection laws. This would create a lower cost mechanism, similar to the model rules enjoyed by other areas of uniform law. Merchants would not have to learn the law of each jurisdiction and consumers would know their rights irrespectively of choice of law. Although harmonization is a monumental task, this is the only present low cost solution.

An individual buyer still may not be able to negotiate the terms of sale, but the ability to scour the 'Net to find all available terms and prices for a product or service anywhere in the world empowers the buyer in ways that may surpass the benefits of negotiation. Absent the maintenance by the seller of an interactive site programmed to accept offers in compliance with its terms from any buyer, it is difficult to conclude that, by merely agreeing to sell something to a buyer located elsewhere, the seller ought to be subject to jurisdiction at the buyer's home. Indeed, it is at least arguable that the buyer has "targeted" the seller and ought to be answerable (for nonpayment, for instance) at the seller's home.[234]

To the extent that the Internet is both limiting the ability of a seller to confine its market and, consequently, dramatically widening the options available to buyers, the presumption of inequality in business-to-consumer transactions is called into question and, therefore, the policy reasons for refusing to enforce contractual choice of forum and law clauses in that context are correspondingly weakened.

## VI. Recent Trends in Cross-Border Jurisdictional Disputes.

### 1. Foreign Defendants in U.S. Courts.

#### (a) Website Alone Insufficient for Jurisdiction.

As Internet use increases globally, so to do the number of jurisdiction-related cases involving international litigants. *Ty Inc. v. Clerk* is an example of the reluctance of U.S. courts to assume jurisdiction over foreign defendants based essentially on their operation of a website.[235] Ty Inc., the creator of Beanie Babies, sued defendants in the U.K. for trademark

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[234]The change may also affect at least default rules respecting applicable law. In Switzerland, for example, a contract is subject to the law of the state with which it is most closely connected, presumed to be the ordinary residence of the party called upon to provide the characteristic performance, *i.e.*, the seller. But to the extent that the buyer defines its purchase, activates delivery, etc., its control may surpass that of the seller, resulting in the use of the law of the buyer's residence. This assumes, of course, that the buyer utilizing a bot is still seen as the buyer; a bot might lack legal standing. *See* Meyer, Müller, Eckert, *ABA Cyberspace Jurisdiction Project*, available at <http://www.kentlaw.edu/cyberlaw/docs/foreign/> [hereinafter Meyer], at A and D. Art. 4 of Rome Convention also mandates use of the law of the country with which the contract is most closely connected, presumed to be the habitual residence of the party who is to effect the performance characteristic of the contract.

[235]2000 U.S. Dist. LEXIS 383 (N.D. Ill.).

infringement, unfair competition, consumer fraud and deceptive trade practices. Defendants sold Beanie Babies and other products through a website registered under the domain name "beaniebabiesuk.com." The website, hosted by an ISP located in California, was accessible to viewers everywhere, including in Illinois. The defendants' website contained an e-mail link through which users could obtain product information, but they could not order merchandise directly through the site. To order, users had to print an order form from the website and either fax, phone, or mail it to the U.K.

The Illinois district court dismissed for lack of jurisdiction, finding that although defendants' website was not completely passive, because its e-mail link enabled customers to direct product-related and order-placement inquires to defendants, the interactivity level was limited by the inability of customers to place orders over the Internet.[236] The court stressed that "defendants made "extremely clear" on their website that they did not conduct on-line transactions.[237]

A similar result obtained in a Tenth Circuit decision involving Soma Medical International ("SMI"), a Delaware corporation based in Utah that made medical monitoring devices.[238] It opened a bank account at the Hong Kong branch of Standard Chartered Bank ("SCB"), a multinational bank based in the U.K. SMI had instructed SCB not to release funds from the account without specific written authorization, but a third person allegedly created a fraudulent signature card, directed SCB to close SMI's account and transfer all the funds to his account in Nevada, and SCB complied, emptying SMI's account. Soma sued SCB in Utah federal court, alleging breach of contract, negligence and other theories. The district court granted SCB's motion to dismiss for lack of personal jurisdiction, and Soma appealed.[239]

The Tenth Circuit affirmed, holding that although SCB's website was accessible in Utah, it was passive under *Zippo*. SCB "'[d]id little more than make information available to those who are interested.'" Accordingly, SCB, through its website, did not engage in the kind of substantial and continuous local activity to render it subject to general jurisdiction in Utah. Moreover, SCB's wholly passive website did not amount to "the kind of purposeful availment of the benefits of doing business in Utah, such that SCB could expect to be haled into court in that state," hence SCB was not subject to specific jurisdiction in Utah.

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[236]*Id.* at *9-*10.

[237]*Id*. at *10. The court found the case "extremely similar" to *Mink, supra*, note 127.

[238]*Soma Medical International v. Standard Chartered Bank*, 196 F.3d 1292 (10th Cir. 1999).

[239]196 F.3d at 1295.

Virginia federal court has also rejected personal jurisdiction over a foreign-based corporation where there was no evidence of targeting.[240] America Online ("AOL") and a wholly-owned subsidiary, both based in Virginia, sued eAsia, Inc. in the Eastern District of Virginia, alleging that defendant's use of the "ICQ" mark on its website constituted various torts, such as unfair competition, infringement, false designation of origin and dilution. eAsia was a California corporation based in Taiwan, developed Internet-related software and provided Internet service for Asia-based customers through its subsidiaries. It targeted primarily, if not exclusively, Chinese-speaking Asians; thus, its web pages were in Chinese and its marketing efforts aimed exclusively at Asia. AOL claimed that eAsia's use of ICQ on its websites infringed AOL's service mark, and that eAsia was subject to personal jurisdiction in Virginia because it had registered the domain names on which the allegedly infringing marks appeared ("picq.com" and "picq.net") with Network Solutions Incorporated (NSI), a domain name registrar located in Virginia.

The court granted eAsia's motion to dismiss for want of jurisdiction.[241] It found that NSI's role in the domain name registry system was "limited to (i) assigning unique second level domain names for certain [Top Level Domains], and (ii) directing DNS queries to the appropriate [Second Level Domain] name server, which server will typically be controlled and maintained (as here) by someone other than NSI."[242] Thus, by registering the allegedly infringing domain names with NSI, such acts were "so modest in scope and nature" that the court found it "difficult" to view them as a basis for jurisdiction.[243] Registration with NSI occurred entirely online, by way of NSI's website, lasted no more than a few minutes, and involved no negotiation of terms nor performance of substantial services in Virginia over time.[244] The court also noted that no evidence was presented that eAsia registered its domain names with NSI because of NSI's Virginia residency.[245] Since eAsia did not "purposefully direct" its activities to Virginia, personal jurisdiction did not exist.

Also declining to find jurisdiction based upon website accessibility was the federal district court in New York, in a case involving a German publishing firm.[246] Plaintiff sought trademark and copyright remedies for alleged unauthorized use of her image in defendant's

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[240]*America Online, Inc. v. Huang*, 106 F. Supp. 848 (E.D. Va. 2000).

[241]*Id.* at 860.

[242]*Id*. at 853.

[243]*Id.* at 855.

[244]*Id.* at 850, 855.

[245]*Id*. at 857.

[246]*Stewart v. Vista Point Verlag & Ringier Publishing*, __ F. Supp. 2d __, 56 U.S.P.Q.2d 1842, 2000 WL 1459839 (S.D.N.Y.).

German-language magazine and website. The court found the defendant's maintenance of a website accessible to New York residents was insufficient for specific jurisdiction under the New York long-arm statute, adding that the site does not target New York residents and, in fact, was "written in German."[247] Significantly, even though the German defendant was neither a citizen nor resident of the U.S., the federal court also ruled that finding jurisdiction "would offend the due process clause of the Fourteenth Amendment."[248] Part of the U.S. contrast to France and Italy, discussed below, lies in the fact that neither European country recognizes constitutional limits on its jurisdictional reach.

A Pennsylvania federal court declined to find personal jurisdiction over a Canadian company in a trademark infringement action where the only contacts with Pennsylvania were the accessibility of its website and links on the home page by which Pennsylvania residents could send emails.[249] The Canadian company did business exclusively in western Canada. The court used a *Zippo* analysis to find the level of interactivity minimal and not sufficient to support jurisdiction.

(b) Website Alone or With Little Additional Activity Sufficient for Jurisdiction.

In contrast to the foregoing cases—and also in contrast to a decision in the United Kingdom discussed below—an Illinois federal court held that a U.S. furniture retailer doing business as "Crate & Barrel" could maintain a trademark action in Illinois against an Irish furniture seller doing business under the same name.[250] The Irish retailer operated a website at <www.crateandbarrel-ie.com>, where visitors could view and purchase goods. The court denied the Irish defendant's motion to dismiss for lack of personal jurisdiction, finding that the website "actively solicits all users, including residents of Illinois, to purchase goods." The court noted that although the defendants had added a statement on the site saying "Goods Sold Only in the Republic of Ireland," users of the site were given the opportunity to select the United States as part or both of their shipping and billing addresses, and the evidence demonstrated that the defendants had actually done business in Illinois using the Crate & Barrel trademark. The court characterized the defendant's site as integral to defendant's operation under the *Zippo* sliding scale.

Out of step with the trend to deny jurisdiction on mere accessibility of a website was the decision by the federal district court in Pittsburgh, Pennsylvania, to take jurisdiction over a

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[247] 2000 WL 1459839 *4.

[248] *Id.*, *5.

[249] *Desktop Technologies, Inc. v. Colorworks Reproduction Design, Inc.*, 1999 WL 98572 (E.D. Pa. 1999).

[250] *Euromarket Designs, Inc. v. Crate & Barrel Ltd.*, 96 F. Supp. 2d 824 (N.D. Ill. 2000).

small Canadian webcasting service called "iCraveTV." iCraveTV in 1999 introduced a system that provided users with the capability to watch 17 channels directly on their personal computers.[251] Among the channels were all the major Canadian broadcasters and a number of U.S. broadcasters (NBC, ABC, PBS, and WB).[252] The broadcasts were picked up by iCrave's antennae in Toronto, then retransmitted in digital form. The signal was tuned into a retransmission signal, then retransmitted in digital form onto the Internet. Viewers could access iCraveTV's signal by personal computer, using Real Player and a high speed modem.

While iCraveTV's activities were legal in Canada, they involved potential copyright violations in the U.S. Accordingly, iCraveTV took several steps to ensure that only persons located in Canada could access the service. The first required a potential user to enter his or her local area code. If the area code entered was not a Canadian area code, the user was denied access to the service. The second step required a potential user to enter into a "clickwrap" agreement confirming that the user was located in Canada. Thus, a user was confronted with two icons: "I'm in Canada" and "Not in Canada." If the user were to click on the "In Canada" icon, he or she would be presented with another clickwrap agreement, setting forth a complete terms of use agreement, including another confirmation that the user was located in Canada. Under iCraveTV's system, U.S. residents needed to navigate through three stages to access the iCraveTV website and could not enter it unless they lied about both their local area code and their location.

Despite iCraveTV's efforts, the federal district court held it had personal jurisdiction. It assumed that football fans necessarily would lie in order to access football games and that the website operators believed the fans would lie. This, of course, is wholly at odds with the policy of Pennsylvania's blue-sky regulators, who were the first to adopt the blue-sky policy that said jurisdiction over a web-based securities offering would not be asserted by the state if the site disclaimed doing business in Pennsylvania and a system of screens and filters were used to block access based on a viewer's representation of residence in Pennsylvania (*see* subsection IV.B.3.b, *supra*). Moreover, it is important for courts to distinguish between *directing* an activity to a forum and merely *having an effect* in that jurisdiction. In the case of iCraveTV, the court confused the two. If anything, iCraveTV was attempting to target Canadians and avoid U.S. residents. This is another example of the broad interpretation that courts will use when they want to find jurisdiction.

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[251]John Borland, *Online TV Service May Spark New Net Battle* (online at <http://news.caet.com/news/0-1004-200-1477491.html>).

[252]*Id.*

2. Non-Residents in Foreign Courts.

(a) France: The Yahoo Case and Jurisdiction Where the Offending Content is Seen.

As discussed earlier, a French court in 2000 took jurisdiction over Yahoo, a corporation located in Santa Clara County with no presence in France, to adjudicate a complaint of French residents that they could access Yahoo's auction site on which Nazi memorabilia were being offered for sale.[253] The complaint was brought also against Yahoo! France, which is Yahoo's French subsidiary, which is located in France, is in the French language and targets the French audience.[254]

A spokesman for one of the two plaintiffs, Ligue Internationale contre le Racisme, et l'Antisémitisme ("LICRA"), alleged that there were more than 1,000 Nazi-related items (pictures, coins flags, etc.) available on the auction site.[255] When the Paris court first ruled on May 22, 2000 that Yahoo was required to block access to such sites in France, where sales of such material are illegal, it gave Yahoo two months to develop a plan for such selective blocking. It subsequently extended this date in order to hear testimony from experts on the technical feasibility of such blocking. The French judge rejected the argument of Yahoo that such screening technology does not exist; rather, the judge asserted, it merely does not work very well at present.[256] Although links to the U.S. auction site were then removed from the Yahoo! France site, Yahoo declined to block French access to its U.S. web portal or put warning messages on its U.S. site. In November 2000, the French court ordered Yahoo to create a filtering system within three months that would prevent Internet surfers in France from accessing its online auctions. It imposed a fine of 100,000 francs ($13,000) per day for each day that Yahoo exceeded the deadline.

Ironically, in a different case triggered by a neo-Nazi website carried by a French Internet service provider, a Nanterre court declined to order the company to tighten its controls on future sites. The court said that service providers had no legal obligation to investigate the identity of their clients. The provider, Multimania, had already closed down the site after a complaint in February. It should also be noted that the U.S. Supreme Court ruled in May, 2000 that an Internet service provider bore no responsibility for the material it carried, and that a court

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[253]INTL. HERALD -TRIBUNE (May 29, 2000), 7. *See also* notes 3-5 *supra* and accompanying text regarding the *Yahoo* case.

[254]Scottish Daily Record (Apr. 13, 2000) 41, 2000 WL 17093040.

[255]*Id.*

[256]*Id.*

in Munich overturned the conviction of the former head of CompuServe in Germany for aiding and abetting the spread of child pornography.[257]

The French decision, if followed by other courts, could make material in a foreign language and not specifically aimed at the population of another country actionable under that country's laws, simply because it is available there. For instance, as pointed out by Yahoo's general counsel, John Place, Muslim countries could entertain lawsuits and award damages against French websites, such as "Moulin Rouge," featuring nudity that constitutes a crime in those countries.[258] In the words of Florent Latrive, a French writer for *Liberation on the Internet*, "[t]his lawsuit marks a watershed—the internet—a space with no boundaries, where one could read the writings of anyone in the world,—is under threat."[259] Latrive went on to predict that the type of reasoning used by the French court would gradually transform the Internet into a rough network of nationalities and jurisdictions, and that a mere click on a mouse might prompt a demand for identity papers before a viewer is allowed to proceed.[260]

Yahoo elected not to appeal the French trial court's judgment, because under French law the judgment would remain in effect pending the appeal.[261] To the extent that courts in other countries endorse the notion that accessibility equals jurisdiction, we may anticipate obstacles to harmony and predictability of jurisdictional questions in cyberspace. Yet such harmony and predictability is crucial to the flowering of E-commerce. As stated in the E.U. Commission's October 2000 proposal, "[d]ifferences between national rules governing jurisdiction and recognition of judgments hamper the sound operation of the internal [E.U.] market.[262]

The question of international jurisdiction can shift from whether a court will take jurisdiction to whether another court will enforce the first court's judgment. This shift occurred in *Yahoo*. In December 2000, Yahoo filed suit in U.S. Federal District Court for the Northern

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[257]David Hearst, *Yahoo! Faces French Fines for Nazi Auctions*, GUARDIAN (July 24, 2000), 2000 WL 24265519.

[258]Address to American Bar Association *National Institute on International Ventures in the Old and New Economies*, San Francisco (November 16, 2000).

[259]Quoted in William Peakin, *Cyberspace Threat to Wipe Out French Sovereignty Over Nazi Loot.* THE SUNDAY HERALD [London] (Aug. 6, 2000), 4, 2000 WL 23171818.

[260]*Id.*

[261]Declaration of Isabelle Camus dated Feb. 16, 2001, on file in case No. C-00-21275 JF, *Yahoo! Inc. v. La Ligue Contre Racisme et L'Antisemitisme, et al.*, U.S. District Court for the Northern District of California, San Jose Division ["*U.S. Yahoo Case*"].

[262]Commission of the European Communities, *Amended Proposal for a Council Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters* (Oct. 26, 2000) COM (2000) 689 final ["EU Proposal"].

District of California, seeking a declaratory judgment that any final judgment in the French court would not be enforceable in the United States.[263] In oral argument before U.S. District Judge Jeremy Fogel in San Jose on April 9, 2001 LICRA attempted to argue that the question of enforceability was not ripe, because the French court had not yet made any effort to actively enforce its order.[264] In an ironic twist, LICRA also objected to jurisdiction of U.S. courts on the ground that LICRA's mailing of a cease and desist letter to Yahoo in California and its procuring of service of process in California did not constitute "purposeful availment" for specific jurisdiction purposes.[265] The District Court found that it had specific jurisdiction.

Judge Fogle subsequently granted summary judgment that the French order would not be recognized in the U.S., because it violates constitutional free speech:

> What *is* at issue here is whether it is consistent with the Constitution and laws of the United States for another nation to regulate speech by a United States resident within the United States on the basis that such speech can be accessed by Internet users in that nation. In a world in which ideas and information transcend borders and the Internet in particular renders the physical distance between speaker and audience virtually meaningless, the implications of this question go far beyond the facts of this case. The modem world is home to widely varied cultures with radically divergent value systems. There is little doubt that Internet users in the United States routinely engage in speech that violates, for example, China's laws against religious expression, the laws of various nations against advocacy of gender equality or homosexuality, or even the United Kingdom's restrictions on freedom of the press. If the government or another party in one of these sovereign nations were to seek enforcement of such laws against Yahoo! or another U.S.-based Internet service provider, what principles should guide the court's analysis?
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> The Court has stated that it must and will decide this case in accordance with the Constitution and laws of the United States. It recognizes that in so doing, it necessarily adopts certain value judgments embedded in those enactments, including the fundamental judgment expressed in the

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[263]*See* complaint filed in *U.S. Yahoo Case, supra*, note 261.

[264]Craig Anderson, *Yahoo Seeks Judge's Shield From French Court Ruling,* DAILY JOURNAL (S.F., Apr. 10, 2001) ["Anderson"], 1.

[265]*Id.; see* Yahoo! Inc.'s *Supplemental Brief in Opposition to Motion to Dismiss*, filed Apr. 12, 2001 in Case No. C-00-21275 JF at 1, 3-4.

> First Amendment that it is preferable to permit the non-violent expression of offensive viewpoints rather than to impose viewpoint-based governmental regulation upon speech. The government and people of France have made a different judgment based upon their own experience. In undertaking its inquiry as to the proper application of the laws of the United States, the Court intends no disrespect for that judgment or for the experience that has informed it.[266, 267]

The Yahoo case was prefigured by an earlier French decision in the *Faurrison* case.[268] There the French court reviewed the prosecution of a website which was edited in French but hosted in the U.S. The defendant contended that the court had no jurisdiction over the matter since the publication had been created in the U.S., where the server was located. The court, however, recognized that the defendant's theory could allow French authors to escape the reach of content obligations imposed by French law, because it is technically impossible to prevent anyone with internet access from uploading materials to a foreign server.[269] The court claimed jurisdiction over the matter under the reasoning that "activities [on the internet] are at the same time here and elsewhere, and, for a judge, declining jurisdiction amounts to admitting that he has no power to put an end to an activity that is blatantly illegal."[270] The Faurisson court referred to a section of the French criminal code, which deems a crime to be committed on the Republic's territory as long as one of its elements takes place in the territory.[271] With regard to press publications, the court held that the crime is deemed to be committed wherever broadcasts are received.[272] Territorial jurisdiction and applicability of French law, the court concluded, extended to the website, which, while hosted abroad, had been viewed within territorial limits.

The result in the Paris court can be contrasted not only with the U.S. cases rejecting jurisdiction based on website accessibility, but with a contemporaneous U.S. federal district court ruling which also involved an online auction site. A federal judge in the Eastern District of Michigan held that the sale by a Texas resident to Michigan residents of allegedly infringing items on eBay's Internet auction site did not create personal jurisdiction in Michigan over the

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[266]*Yahoo! Inc. v. La Ligue Contre Le Racisme*, 145 F. Supp. 2d 1168 (N.D. Cal. 2001).

[267]*Yahoo! Inc. v. La Ligue Contre Le Racisme*, 169 F. Supp. 2d 1181, 1186-87 (N.D. Cal. 2001).

[268]T.G.I. Paris, Nov. 13, 1998. Reported in Julien Mailland, *Freedom of Speech, the Internet, and the Costs of Control*, 33 N.Y.U. J. Int'l L. & P. (2001) 1179, 1207.

[269]*Id.*

[270]*Id.*

[271]*Id.* at 1208.

[272]*Id.*

Texas resident.[273] The Michigan plaintiff company made and sold craft patterns for decorative figures such as reindeer and Easter bunnies. The defendant, a Texas resident who made and sold her crafts almost exclusively in the Houston area, occasionally made mail-order purchases of the plaintiff's patterns and used them to make crafts. In 1999, she sold to Michigan residents over the eBay auction site, some craft goods based on the plaintiff's designs. The Michigan court refused to broadly hold that the mere act of maintaining a website that includes interactive features ipso facto established personal jurisdiction over the sponsor of that website anywhere in the United States.

After the plaintiff sued in Michigan for copyright infringement, the defendant moved to dismiss for lack of personal jurisdiction, asserting that she never transacted any business in Michigan, never been to the state, and never owned or maintained any property there. In contrast to the Paris court, the court found that plaintiff had failed to show the "minimum contacts" required under *International Shoe*. The court ruled that, merely by listing her craft goods for sale on eBay, defendant did not target Michigan residents and that Michigan residents simply happened to be the winning bidders in those auctions. Since defendant had no control over who was the highest bidder, she could not have purposefully availed herself of the privilege of doing business in Michigan. The court reasoned that her sales were random and attenuated.

The Michigan court also addressed the *Zippo* "sliding scale," noting that under *Zippo*, defendant's site would be a hybrid "middle ground" or "interactive" site. The court expressed concern over the lack of clarity under *Zippo* as to the proper means of measuring a site's level of interactivity in guiding personal jurisdiction and questioned the need for a special Internet-focused test for minimum contacts. It found that the ultimate question still had to be answered by determining whether the defendant had sufficient "minimum contacts" in the forum state: "The manner of establishing or maintaining those contacts, and the technological mechanisms used in doing so, are mere accessories to the central inquiry." The court also faulted the failure of plaintiff to show that the defendant's site resulted in the development of any customer base in Michigan to warrant personal jurisdiction. It expressed the view that even under *Zippo*, the nature and quality of the asserted contacts are more important than the quantity of contacts. To the court, the fact that the site may have been "interactive" implied nothing about the extent of defendant's involvement with Michigan as a specific forum for any of her business. Even if all commercial websites could be accessed from anywhere a computer is connected to the Internet, the judge found a lack of evidence as to the level of interactivity or how such a level might compare with one who actively does business with Michigan residents: "Without such indications of active (or perhaps 'interactive') efforts to secure customers in the forum state through her website, the use of the Internet alone is no more indicative of local jurisdictional contacts than an isolated advertisement in a nationally-distributed magazine."

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[273] *Winfield Collection Ltd. v. McCauley*, (E.D. Mich., No. 99-CV-75875-DT, July 24, 2000.

(b) Italy.

Italy, in January 2001, through its appeals court, ruled that foreign sites could be blocked if they failed to comply with Italian anti-defamation laws.[274] The ruling by a Milan appeals court followed a complaint from a Genoa resident, Moshe Dulberg, that several U.S.-and Israel-based websites had accused him of "kidnapping" and "brainwashing" his two young daughters. Dulberg claimed defamation in a lower court, which passed the case to the Milan appeals court on grounds that it was beyond the lower court's jurisdiction. Although the court did not address general Internet issues in its ruling, legal experts said the ruling could set a precedent that would require Italian internet service providers to monitor and control the material accessible through their services. How closely that line is followed will not be known until another case is filed, the Dulberg case will be referred to as a precedent.[275] No damages were awarded in the Dulberg case, but the Court ruled that since they are distributed by Italian service providers, local authorities can order access to the sites can be blocked.

The allegedly defaming pages were produced as a result of a bitter battle between Dulberg and his former wife, Tali Pikan-Rosenberg, over custody of their two girls. Dulberg sued for and was awarded custody of the girls in 1997, but they never returned. In 1999, Pikan-Rosenberg was discovered with the two girls in Tel Aviv, and an Israeli judge ordered the children returned to their father. At that point, a war of the websites began. An Italian site said Pikan-Rosenberg suffered from "an unstable psychological condition" and it accused her of kidnapping the girls. An Israeli site countered by publishing nine pages, alleging among other things that Dulberg was attempting to "change the girls into true Italians . . . by depriving them of kosher foods [and] depriving them of their religion." The Israeli site also published letters purportedly written by the two girls, calling their father "frightening" and accusing him of violence.[276]

Dulberg then filed the anti-defamation suit, alleging that the web campaign violated his rights of privacy under the Italian constitution. The result was contrary to a ruling in a previous case—involving print media, not the Internet—which said that Italian judges cannot pursue defamation-related crimes that originate outside the country. The Milan court said that

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[274] *In re Dulberg*, reported on World Internet L. Rep. (February 2001), 14; *see* Ruth Gruber, *Italy Blocks Web Sites*, JERUS. POST (Feb. 7, 2001) online at <www.jpost.com/Editi . . . 02/07/JewishWorld/JewishWorld.21001.html>.

[275] Anderson.

[276] *Id.*

Dulberg's case was prosecutable because Italian Internet users needed Italy-based service providers in order to view the offending pages.[277]

(c) United Kingdom.

In contrast to the Illinois federal court's decision involving the same litigants was the holding of the United Kingdom High Court in *Euromarket Designs Inc. v. Peters*.[278] The same U.S. plaintiff that prevailed on the jurisdictional issue in its trademark suit in Illinois federal court[279] sued essentially the same defendants in the U.K., where plaintiff had a registered mark for domestic and garden items. However, the U.K. court found that plaintiffs did not trade in the United Kingdom.[280] Defendants had since 1994 run a shop in Ireland called "Crate and Barrel." Plaintiff alleged two acts of infringement in the U.K. One was a magazine advertisement and the other a website upon which the Crate and Barrel mark was used. A hurricane lamp and a beaded coaster were sold through the site, which goods fell within those covered by plaintiff's registered mark.

Plaintiff applied for summary judgement, alleging that defendant had obtained the idea for its name from one of plaintiff's shops in the U.S. Defendant claimed there was no use of the mark in the course of trade in the U.K. and that, in any event, it was a fair use of its own name, denying that the name had been "copied." Defendant said it had no customers in the U.K. and did not expect the website or magazine ad to drum up business there.[281]

The judge court dismissed the application for summary judgment against defendants, ruling that, for purposes of summary judgement, he had to assume there was no copying; at the same time, the court also ruled that it probably lacked jurisdiction over defendants.[282] Although plaintiff argued that the presence of an advertisement in a U.K. magazine was enough to establish a "course of trade" in the United Kingdom, the court thought that it was necessary to inquire as to the purpose and effect of the advertisement.[283] Since the advertisement for the Irish shop was in a magazine with both Irish and U.K. circulation, the court viewed it as analogous to a trader merely carrying on business in State X, when one of his advertisements slips over the border into State Y. In such case, the court did not believe any businessman would regard that

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[277] *Id.*

[278] Case reported in E-COMMERCE LAW & POLICY (Aug. 2000), 02.

[279] *See* note 250, *supra*.

[280] E-COMMERCE LAW & POLICY (Aug. 2000), 02.

[281] *Id.*

[282] *Id.* at 03.

[283] *Id.*

slip as meaning that he was "trading" in Y, particularly if the advertisement were for a local business, such as a shop or a local service.

The court viewed the local nature of the website as even clearer. The website was attached to an "ie" domain name (which denotes Ireland), making it fairly obvious in its opinion that the site related to a shop in Ireland. Accordingly, there was no reason why anyone in the U.K. should regard the site as directed to him.[284] The court opined that whether a user arrived at the website by a search or by directly typing the address, it did not follow that defendants were using the words "Crate & Barrel" in the U.K. in the course of trade in goods. Otherwise, "it must follow that the defendants are using it in every other country of the world."[285] The court cited an earlier ruling where he rejected the suggestion that the website owner should be "regarded as putting a tentacle onto the user's screen." Instead, the court approved of plaintiffs' analogy: using the Internet was like the user focussing a super telescope from the Welsh hills overlooking the Irish Sea to look into defendant's shop in Dublin. The court also reasoned that the very language of the Internet conveys the idea of the user *going to the site*, since "visit" is the common word.[286]

### (d) Germany

The German Supreme Court in 2000 ruled that any web publisher, no matter what his or her country of origin, is liable under German criminal law for any pro-Nazi or Holocaust denial information on their pages which can be accessed from Germany.[287] Before this case, it was thought that web publishers were only liable if the web material had originated in Germany. The court ruling rejected the appeal of Frederick Toben, an Australian Holocaust revisionist who denied that millions of Jews died during the Second World War. He was not successful in an attempt to claim that, since his Internet material was "printed" outside of Germany, it was not subject to German legislation.

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[284] *Id.*

[285] *Id.*

[286] *Id.*

[287] BGHZ 46, 212 (Case Az.: 1 StR 184/00) decided on December 12, 2000; reported in Avril Haines, *The Impact of the Internet on the Judgments Project: Thoughts for the Future*, PREL. DOC. NO. 17 (2002) HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW ["Haines"] 21.

### (e) China

In China a law was adopted in late 2000 dealing with Internet copyright disputes at a meeting of the Judgment Committee of the Supreme People's Court.[288] Article 1 of the new law provides for jurisdiction in cases dealing with Internet copyright infringement either where the infringing act occurs or where the defendant is domiciled. The law states that when it is difficult to ascertain where the infringing act occurred or where the defendant is domiciled, the computer terminal at which the plaintiff discovered the infringement shall be deemed to be the place where the infringing act is committed. Thus, mere accessibility of a website can be sufficient for the exercise of jurisdiction.

### (f) Australia

In Australia, the Supreme Court of Victoria in August 2001 exercised jurisdiction over an American defendant publisher who was sued for defamation by an Australian for material put on a website which was then downloaded by subscribers around the world.[289] The court held that the information on the site was legally published in Victoria, Australia when the plaintiff and others downloaded it, and thus the court had jurisdiction over the case. It stated that the place of publication was a proper forum, and that "publication takes place on downloading," not where the material is uploaded.[290]

## VII. Possible Approaches to Measuring the "Effects" Test.

As earlier discussed, a significant trend in jurisdiction cases has been to focus on the place where information is *directed*, or where the residents are "targeted." Applying traditional principles of securities jurisdiction, jurisdiction is being extended in online cases to persons who use the Internet to "target" residents of a given jurisdiction. Under current cases, when a person located outside a given jurisdiction uses a website to conduct transactions with residents of that jurisdiction, the website operator has "availed" itself of the jurisdiction and should reasonably expect to be subject to its courts in matters relating to the transactions. However, the intercession of a cyberagent, or "bot," dealing with other bots in cyberspace is not necessarily "availing" itself of a jurisdiction. Other factors can be considered, as discussed below.

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[288] *See* The Supreme People's Court Interpretation on the Law Application in the Trial of Internet Copyright Disputes, *available at* http://www.lawinfochina.com/LegalForum/ChineseLawInterpreted/displayContent.asp?ID=29 (Nov. 22, 2000), reported in Haines at 22.

[289] *Gutnick v. Dow Jones*, [2001] VSC 305, also reported in Haines at 22. The High Court of Australia on December 14, 2001 granted special leave for Dow Jones to appeal on the issues of where the alleged defamation on the Internet had been committed and whether the law of New Jersey or that of Victoria applies. The appeal is likely to be heard in August or September of 2002. *Id.*

[290] *Gutnick v. Dow Jones* at par. 67.

While the "effects" test has much in common with "targeting," and many decisions use the words almost interchangeably, they do not have exactly the same connotations, particularly when applied to the Internet. Targeting connotes an effort specifically to reach persons in the forum, whereas an effect might be produced within a given forum by acts that, at least on the surface, are not aimed there. One of the fertile arenas for development of the "effects" test is in trademark cases. Indeed, the first case to invoke *Calder* to enforce jurisdiction in cyberspace was a trademark action.[291] In this context, the alleged infringer is deemed to know that the trademark owner resides in Jurisdiction A, would be made uncomfortable in A by activities (infringement) occurring in Jurisdiction B, and hence the infringer must be deemed to have intended such discomfort in A.[292] This can be a useful legal fiction, but is not necessarily based upon evidence unless there is some showing, as in cybersquatting cases, that the infringer tried to extract money from the owner. Perhaps in the future, as the use of bots and other agents increases, courts should require clear and convincing evidence of an intended impact before making a foreign entity subject to forum jurisdiction. Just because there *is* some effect does not necessarily mean that the effect was actually *intended*, particularly where a piece of data can be circulated millions of times over in a matter of seconds.

At the same time, some respected commentators such as Professor Michael Geist of the University of Ottawa Law School, see the effects test as becoming increasingly popular in the courts and argue that it should replace the *Zippo* sliding scale.[293] In any event, part of the effects test should be to quantify and analyze factors which can truly indicate an intent to make an impact on a certain country. This would include:

A. Specific Transactions Directed to the Jurisdiction.

Under current cases, when a person located outside a given jurisdiction uses a website to conduct transactions with residents of that jurisdiction, the website operator has "availed" itself of the jurisdiction and should reasonably expect to be subject to its courts in matters relating to the transactions. However, the intercession of a bot dealing with other bots and avatars in cyberspace is not necessarily "availing" itself of a jurisdiction.

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[291] *See* discussion of *Panavision Int'l, L.P. v. Toeppen*, *supra*, notes 141-144 and accompanying text.

[292] *See Nissan Motor Co. Ltd. v. Nissan Computer Corporation*, 89 F. Supp. 2d 1154 (C.D. Cal. 2000); *Euromarket Designs, Inc. v. Crate & Barrell Ltd*., 96 F. Supp. 2d 824 (N.D. Ill. 2000).

[293] Michael Geist, *Is There A There There: Toward Greater Certainty for Internet Jurisdiction* (April 2001), online at <http://aix1.uottowa.ca/~geist/geistjurisdiction-us.pdf>. Professor Geist has generously allowed his paper to be reproduced in this PLI handbook as supplemental material on the jurisdiction issue.

B. Push Technology.

The conscious "pushing" of information into a given jurisdiction, whether by a bot or any other complex of agents, can probably still be viewed as targeting activity that warrants specific jurisdiction in the location of the "pushee."

C. Language.

The selection of language on which information is cast can also be relevant to the "targeting" issue. At present, the great majority of Internet communication is conducted in English (even though that may be expected to decrease over time).[294] This, together with the fact that English is the standard commercial language, make its use on a website insufficient ordinarily to establish jurisdiction of an English-speaking country. However, an Internet offering in Tagalog may arguably be considered to be targeted at residents of the Philippines, just as securities offerings in Dutch on the Internet are considered by Dutch securities regulators to be offered to residents of the Netherlands.

Again, bots alter the equation. A robot need not communicate in any human language, and indeed could be programmed to communicate in *every* principal language. Thus, languages other than English become less evidence of targeting.

D. Currency.

When goods or services are quoted in a currency other than that of the issuer's place of incorporation, this is arguably some evidence of "targeting." Currencies such as the E.U. are intended to be generic and should not be evidence, taken alone, of targeting any jurisdiction. Nor should widely-used currencies be seen, taken alone, as evidence of targeting. For example, U.S. dollars are almost akin in their pervasiveness to the use of English on the Internet. Pounds Sterling and Swiss Francs are likewise universal currencies. If an offer is expressed in Spanish Pesetas and available in Spain, Spanish law should arguably apply. On the other hand, an offering expressed in Spanish Pesetas and accessed in Italy would probably not be deemed directed to Italian viewers.

However, as bots and agents can change the significance of this factor as well. They will be able to translate one currency into another in a nanosecond, making currency identification less of a significant factor.

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[294] *The Economist*, London (Oct 24, 1997).

E. Tax and Special Laws.

If Internet securities information which goes into detail on the tax laws or other laws of a particular nation could be deemed targeted to that particular audience. . . . by pointing out that, regardless of the precautions adopted, if the content appeared to be targeted to the U.S. (*e.g.*, by a statement emphasizing the investor's ability to avoid U.S. income tax on the investments) then it would view the website as targeted at the U.S. Arguably, the intervention of bots and agents would not affect this factor.

F. Pictorial Suggestions.

A French Franc-denominated website offer made on a background of the Eiffel Tower might be said to be aimed at French viewers. But can they be said to be aimed at a French investor's multilingual bot? The answer would depend on how nearly the bot's information system was programmed to include the principal's patriotic sensibilities.

G. Consideration of Disclaimers.

Disclaimers are already a regular part of international paper-based securities offerings. While typically lengthy with respect to U.S. securities laws, disclaimers are often much shorter and less specific for other jurisdictions. Disclaimers may amount to no more than a statement that an offer is not made in any jurisdiction where the site operator does not want to do business.

The proliferation of bots could actually make the use of disclaimers even more meaningful. Common types of software protocols could efficiently screen out properly-programmed bots before they even accessed a screen. Acting sort of like a long-range radar, the disclaimers would deter certain bots from even approaching certain areas of cyberspace. The question is whether the targeting approach will fit the Internet down the line, where highly sophisticated robots will be moving through a wholly non-geographic virtual "space" to both communicate and transact business, frequently with other robots, and without human intervention.

For a purchaser (or seller) to engage in the use of robots and other non-geographically grounded intermediaries is somewhat like sending a note in a bottle out to sea: it becomes harder to argue that the note writer's home jurisdiction should control in preference to the residence of whoever picks up the note or the place where it is picked up. By like token, a web participant who unleashes a bot into a digital environment awash with other robots and virtual proxies has voluntarily "left" his or her geographical and elected to travel and transact in a wholly different environment. It is harder to argue that such a person can have a reasonable belief that the laws or the courts of the home jurisdiction will apply.

## VIII. The "Jurisdiction Project" of the American Bar Association: London 2000.

### A. The Jurisdiction Project Finds the Power of the Consumer Vis-à-Vis the Supplier Has Increased.

In July 2000, after a two-year study, the American Bar Association Jurisdiction Project ("Jurisdiction Project") presented an analysis and recommendations regarding jurisdiction in cyberspace.[295] The Jurisdiction Project Report stressed the change in power between buyers, intermediaries and sellers.

The Report noted that many jurisdictional rules as they are applied to commercial transactions reflect presumed power imbalances between buyers and sellers. The traditional concept on which much jurisdictional analysis is based is that sellers ordinarily seek out buyers (manifesting their desire to benefit from a connection with the buyers' forum) and to set the terms of the purchase contract. Those presumptions may well be subject to challenge, if not today, in the very near future.

First, the Internet generally empowers consumers vis-à-vis sellers, because power in a commercial relationship is directly related to knowledge and choice. The Internet expands choice by opening up every market worldwide to every buyer regardless of where the seller is located. A priori, therefore, electronic commerce strengthens buyers with respect to sellers because it opens up more possibilities for the buyer. Thus, the implied concern that buyers will be taken advantage of by sellers to whom they are tied by geographic or other limitations becomes less appropriate.

Moreover, the ability of the Internet to lower economic barriers to entry has in the past few years resulted in dramatic rise in the ability of smaller sellers to transact business beyond a single geographic location. Although not entirely different from catalogue and telephone businesses, the scale attainable on the Internet with lower costs presents an entirely new phenomenon. This phenomenon expands consumer choice and undermines the assumption that most sellers will be much larger than most buyers. In E-commerce, many transactions may occur between very small enterprises and individuals. The consumer law's concern with an imbalance in bargaining power may be less significant for Internet-based commerce, because technology has substantially affected the leverage between buyer and seller. Market pricing is now transparent, and intermediaries and the costs they add to the product have become irrelevant.

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[295] *See Achieving Legal and Business Order in Cyberspace: Jurisdictional Issues Created by the Internet* [Report by the American Bar Association ("ABA") Jurisdiction in Cyberspace Project, ABA Annual Meeting in London July 17, 2000] reprinted in 55 Bus. Law 1801 (2000) (hereafter "Jurisdiction Project Report"). The author served as Chair of the Working Group on Securities for this Project.

The Jurisdiction Project Report also saw the advent of bots as adding further to the power of consumers:

> An individual buyer still may not be able to negotiate the terms of sale, but the ability of the buyer's bots to 'scour' the global marketplace for available terms and prices for products or services empowers the buyer in ways that may surpass the benefits of negotiation. Absent clear targeting by the seller, it is difficult to conclude that, by merely agreeing to sell something to a buyer located elsewhere, the seller ought to be subject to jurisdiction at the buyer's home. Indeed, it is at least arguable that the buyer has 'targeted' the seller and ought to be answerable (for nonpayment, for instance) at the seller's home.[296]

### B. The Jurisdiction Project Report Described How Critical It Is To Avoid Uncertainties in E-commerce.

It is not simply a matter of reconciling sharply contrasting European and American approaches to choice of law; the question is whether characteristics of Internet transactions necessitate new approaches to choice of law, which have not been adopted under the pressure of earlier forms of commerce. The Internet makes things more complex. The argument over whether the law of the place origin or the law of the place of the consumer should be applied to E-commerce disputes involving consumers becomes fuzzy as to actual location of a commercial Internet transaction: Where is a Web page located, where it is viewed, or on a client computer, or where the server transmitting the code is located? When is a transaction completed, when the server transmits a Web page, or when a client transmits the URL that automatically causes the page to be transmitted from a remote server?

The Internet's inherently global reach justifies special efforts to reduce uncertainty with respect to choice of law. As compared to pre-Internet modes of doing business, an Internet seller must undertake extraordinary steps to limit the reach of its solicitation of customers and receipt of customer orders; the Internet does not naturally associate either sellers or buyers with physical places. However, technology may be used to redress the jurisdictional issues raised by the technological efficiencies and global reach of the Internet. The existence and continuing development of super-intelligent Bots, which can be deployed by sellers and purchasers to

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[296] Jurisdiction Project Report at 1830. The change may also affect default rules in connection with applicable law. In Switzerland, for example, a contract is subject to the law of the state with which it is most closely connected, presumed to be the ordinary residence of the party called upon to provide the characteristic performance, *i.e.*, the seller. But to the extent that the buyer through a super-intelligent bot defines its purchase, activates delivery, etc., its control may surpass that of the seller, resulting in the use of the law of the buyer's residence. The Rome Convention also mandates use of the law of the country with which the contract is most closely connected, presumed to be the habitual residence of the party who is to effect the performance characteristic of the contract. Article 4.

evaluate the relative product, price and jurisdictional terms of the potential relationship, may provide a basis for a global standard, as long as the underlying legal "code" can be agreed upon.

C. Criteria for Determining Jurisdiction Made by the Jurisdiction Project Report.

The Jurisdiction Project Report arrived at certain recommendations regarding jurisdiction that recognize the new consumer power and the more level playing field. Among these are six jurisdictional "default" rules:

(a) Personal or prescriptive jurisdiction should not be asserted based solely on the accessibility in the state of a passive website that does not target the state. (It is this rule that runs directly contra to the French court's ruling in the Yahoo case.)

(b) Both personal and prescriptive jurisdiction should apply to a website content provider or application service provider ["sponsor"] in a jurisdiction, assuming there is no enforceable contractual choice of law and forum, if:

(i) the sponsor is a habitual resident of that jurisdiction;

(ii) the sponsor "targets" that jurisdiction and the claim arises out of the content of the site;[297] or

(iii) a dispute arises out of a transaction generated through a website or service that does not target any specific jurisdiction, but is interactive and can be fairly considered to knowingly engage in business transactions there.

(a) Consumers (purchasers) and sponsors (sellers) should be encouraged to identify, with adequate prominence and specificity, the jurisdiction in which they habitually reside.

(b) Sponsors should be encouraged to indicate the jurisdictional target(s) of their sites and services, either by: (a) defining the express content of the site or service, or listing destinations targeted or not targeted; and (b) by deciding whether or not to engage in transactions with those who access the site or service.

(c) Good faith efforts to prevent access by users to a site or service through the use of disclosures, disclaimers, software and other technological blocking or screening mechanisms should insulate the sponsor from assertions of jurisdiction.

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[297]What should be deemed to constitute "targeting" is a subject that needs a global consensus. *See* subsection D., *infra*, regarding the creation of a Global Online Standards Commission.

(d) Personal and/or prescriptive and/or tax jurisdiction should not be exercised merely because it is permissible under principles of international law. Rather, the application of such jurisdiction should take into account:

(i) the interests of other states in the application of their law and the extent to which laws are in conflict;

(ii) the degree to which application of a state's own law will impede the free flow of electronic commerce;

(iii) whether the regulatory or tax benefits to be gained through the assertion of jurisdiction are sufficiently material to warrant the additional burden on global commerce that it will impose; and

(iv) principles recognized under national abstention doctrines, such as forum non conveniens, where the interests of justice or convenience of the parties or witnesses point to a different place as the most appropriate one for the resolution of a dispute.

As to contractual choice of law and forum, the following three principles should apply between buyers and sellers:

(a) Absent fraud or related abuses, forum selection and choice of law contract provisions could be enforced in business-to-business electronic commerce transactions.

(b) In business-to-consumer contracts, courts should enforce mandatory and non-binding arbitration clauses where sponsors have opted to use them, and should permit the development of a "law merchant," in exchange for:

(i) the sponsor's agreement to permit enforcement of any resulting final award or judgment against it in a state where it has sufficient assets to satisfy that award or judgment; and

(ii) the user's acceptance of an adequately disclosed choice of forum and choice of law clauses.

(c) Jurisdictional choices should be enforced where the consumer demonstrably bargained with the seller, or the choice of the consumer to enter into the contract was based on the use of a programmed consumer's bot[298] deployed by or on behalf of the consumer and whose programming included such terms as the nature of the protections sought,

[298] A consumer's "bot" should be defined as one to which no criteria were applied except those explicitly specified by the consumer, *i.e.*, a "fiduciary" bot.

the extent to which such protections are enforceable and other factors that could determine whether the user should enter into the contract.

In addition, the Report sought to encourage "safe harbor" agreements, such as the one negotiated between the United States and the European Union in the context of personal data protection, as models for the resolution of jurisdictional conflicts in cyberspace, to the extent that they include a public law framework of minimum standards, back-up governmental enforcement, and the opportunity for a multiplicity of private, self-regulatory regimes that can establish their own distinctive dispute resolution and enforcement rules. Moreover, bots and other electronic agents could readily be employed to assist users to resolve jurisdictional issues by allowing such agents to communicate and/or compromise jurisdictional preferences preprogrammed by users. To do so, global protocol standards would have to be developed to allow such agents to operate universally.

D. Towards a Global Online Standards Commission.

Looking to the future, the ABA has proposed empanelling a multinational Global Online Standards Commission ("GOSC") to study jurisdiction issues and develop uniform principles and global protocol standards by a specific sunset date, working in conjunction with other international bodies considering similar issues.[299] Other organizations such as the Global Business Dialogue, Hague Conference on Private International Law, the Internet Law and Policy Forum, the International Chamber of Commerce, the United Nations Commission on International Trade Laws ("UNCITRAL"), the World Intellectual Property Organization ("WIPO"), the World Trade Organization ("WTO") have spent considerable time and effort studying jurisdiction issues in cyberspace.

The GOSC would, in addition to the principles enumerated earlier, follow these precepts:

(a) In the interests of encouraging the growth of electronic commerce on a fair, universal and efficient basis, governmental entities should be cautious about imposing jurisdictional oversight or protections that can have extra-territorial implications in cyberspace.

(b) Technological solutions, such as universal protocol standards, employed by intelligent electronic agents may be developed so that users and sponsors may electronically communicate jurisdiction information and rules (including rules relating to taxation), enabling such preprogrammed agents to facilitate the user's or sponsor's automated decision to do business with each other.

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[299] Jurisdiction Project Report at 1823.

(c) In the interests of fairness, jurisdictional rules should be developed by and/or only after full consideration of the views of those who must abide by them and/or those substantially impacted by them.

(d) The creation of responsible, private sector, contract-based regimes to which local governments may defer can reduce jurisdictional uncertainty and be more readily adapted to the needs of electronic commerce.

(e) Global regulatory authorities of highly regulated industries, such as banking and securities, should reach agreement regarding either the uniform application of laws, rules and regulations to the provision of such products and services, or develop rules as to whose laws will be applied in an electronic environment.

(f) Any use of intermediaries (called "choke points" or private network junctures) in the flow of electronic information, commerce and money, such as internet service providers and payments systems, to regulate commercial behavior and to enforce jurisdictional principles impose significant, new legal burdens on those private entities and should require very careful exploration before being proposed for adoption. For example, tax authorities may attempt to increase their efforts to create, on a global basis, uniform rules for requiring tax assistance from non-resident providers of goods and services over the Internet, including efforts to encourage large and sophisticated providers of financial, credit or similar services to discharge a greater part of the burden of tax assistance. Requiring such assistance is controversial. The E.U. recently proposed requiring foreign sellers of services delivered over the Internet to E.U. customers to charge the value-added taxes; the U.S. immediately protested.[300]

(g) Voluntary industry councils and cyber-tribunals should be encouraged by governmental regimes to continue developing private sector mechanisms to resolve electronic commerce disputes. Government-sponsored online cross-border dispute resolution systems may also be useful to complement these private sector approaches.

(h) Cyberspace may need new forms of dispute resolution—to reduce transaction costs for small value disputes, and to erect structures that work well across nation boundaries. The disputes resolution machinery established under ICANN rules to resolve trademark/domain name disputes is a promising example. Credit card chargebacks are another good example, which deserve elaboration for Internet E-commerce.

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[300] *See EU proposed Web tax*, CNN Financial Network, June 8, 2000 <http://cnnfn.com/2000/06/08/europe/eu_vat/>

boundaries. The disputes resolution machinery established under ICANN rules to resolve trademark/domain name disputes is a promising example. Credit card chargebacks are another good example, which deserve elaboration for Internet E-commerce.

(j) The global benefits of reciprocal enforcement of judgments should be explored.

(k) Businesses consortia that can forge workable codes of conduct, rules and standards among a broad spectrum of electronic commerce participants may provide an efficient and cost effective jurisdictional model that governments can adopt and embrace.

## IX. Conclusion.

The recommendations and findings of the Jurisdiction Project confirmed what many number have observed: the Internet empowers consumers in ways not imagined previously. Moreover, the advance of bot technologies and other developments will further these powers. At the same time, technology is always moving in the Internet arena, and the evolution of filtering and screening technology that would build up "virtual" walls and moats in cyberspace may require a reanalysis of the *Zippo* doctrine as well as of the "effects" test.

The call for a Global Online Standards Commission is perhaps too ambitious at this time. Even the efforts of the Hague Conference to develop principles that can form a convention on cyberspace jurisdiction have yet to achieve consensus. In any event, common standards for E-commerce throughout the globe are sorely needed. For the world of E-commerce to reach its potential, jurisdictional outcomes should be as predictable as possible, they should be as uniform as possible. At the same time, the inconsistent applications of jurisdictional criteria compel a need for development of alternate dispute resolution mechanisms that can deal efficiently and fairly with E-commerce disputes.

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